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Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1848

RETAIL STORE EMPLOYEES UNION, LOCAL NO. 919; ARNALDO F. ESPINOSA, *et al.*,
Petitioners,

v.

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION; WILLIAM H. WYNN, *et al.*,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
A. The District Court's Findings, Conclusions and Order	5
B. The Court of Appeals' Decision	12
REASONS FOR GRANTING THE WRIT	14
I. THE COURTS BELOW REJECTED APPLICATION OF THIS COURT'S ILLEGAL MOTIVE TEACHINGS TO THE ACT'S PROTECTION OF LOCAL AUTONOMY	14
II. EVEN ON THE ASSUMPTION THAT DISCRIMINATORY, UNLAWFULLY MOTIVATED, AUDIT IS NOT A "TRUSTEESHIP," THE DECISION BELOW CONFLICTS IN PRINCIPLE WITH DECISIONS OF OTHER CIRCUITS AND WITH FUNDAMENTAL TEACHINGS OF THIS COURT	18
III. CERTIORARI SHOULD BE GRANTED TO IMPLEMENT THE BALANCE CONGRESS STRUCK BETWEEN PROTECTION OF LOCAL AUTONOMY BY LAW AND AVOIDANCE OF UNDUE INTERFERENCE IN INTERNAL UNION AFFAIRS	22
IV. UNEXPLICATED DISREGARD OF THIS COURT'S TEACHINGS WARRANTS EXERCISE OF THE SUPERVISORY POWER OF THIS COURT	23
CONCLUSION	24
STATUTE APPENDIX	1a
OPINION APPENDIX	4a

TABLE OF AUTHORITIES

CASES: Page

Albermarle Paper Co. v. *Moody*, 422 U.S. 405 (1975) 13
American Federation of Musicians v. *Wittstein*, 379 U.S. 171 (1964) 22
Benda v. *Grand Lodge of Intern. Ass'n, Etc.*, 584 F.2d 308 (9 Cir. 1978), cert. dismissed, 441 U.S. 937 (1979) 17, 18
Brotherhood of Painters v. *Brotherhood of Painters, L.U. 127*, 264 F.Supp. 301 (N.D. Cal., 1966) .. 17, 18
Cannon Electric Company, 151 NLRB 1465 (1965) 21
Cooke v. *Orange Belt Dist. Council of Painters*, 529 F.2d 815 (9 Cir. 1976) 19
Council #61 v. *AFSCME*, 80 LRRM 2942 (D. N.J., 1972) (not officially reported), rev'd on other grounds, 478 F.2d 1156 (3 Cir. 1973), cert. denied, 414 U.S. 975 18
Cross v. *Mine Workers*, 82 LRRM 2614 (S.D. Ill., 1973) 17, 18
Davis v. *Wechsler*, 263 U.S. 22 (1923) 10
Delaware v. *Prouse*, 440 U.S. 648 (1979) 7
Deposit Guaranty National Bank v. *Roper*, —— U.S. ——, No. 78-904, 48 L.W. 4279 (March 19, 1980) 12
Goldberg v. *Truck Drivers Local Union No. 299*, 293 F.2d 807 (6 Cir. 1961) 19
Gomillion v. *Lightfoot*, 364 U.S. 339 (1960) 18
Hall v. *Cole*, 412 U.S. 1 (1973) 11
Hendrix Manufacturing Company v. *NLRB*, 321 F.2d 100 (5 Cir., 1963) 21
Hurwitz v. *Directors Guild*, 364 F.2d 67 (2 Cir., 1966), cert. denied, 385 U.S. 971 23
Johnson v. *Nelson*, 325 F.2d 246 (8 Cir. 1963) 19, 20
Jolly v. *Gorman*, 428 F.2d 960 (5 Cir., 1970), cert. denied, 400 U.S. 1023 ..... 15, 17, 23
Labor Board v. *Erie Resistor Corp.*, 373 U.S. 221 (1963) 14, 19, 20

TABLE OF AUTHORITIES—Continued

Page

Labor Board v. *Mexia Textile Mills*, 339 U.S. 563 (1950) 13
Local No. 1 ACA; Etc. v. *IBT, C.W. & H.*, 419 F.Supp. 263 (E.D. Pa., 1976), aff'd, —— F.2d ——, 103 LRRM 2268 (3 Cir., 1980) 19
Local U. 13410, United Mine Workers v. *United Mine Workers*, 154 U.S. App. D.C. 332, 475 F.2d 906 (1973) 23
McDonald v. *Oliver*, 525 F.2d 1217 (5 Cir., 1976), cert. denied, 429 U.S. 817 18
Machinists Local v. *Labor Board*, 362 U.S. 411 (1960) 19, 20
Maness v. *Meyers*, 419 U.S. 449 (1975) 11
Memphis Light, Gas & Water Div. v. *Craft*, 436 U.S. 1 (1978) 11
Mincy v. *District of Columbia*, 218 A.2d 507 (D.C. App. 1966) 7
Monborne v. *United Mine Workers*, 342 F.Supp. 718 (W.D. Pa., 1972) 17, 18
Mt. Healthy City Board of Ed. v. *Doyle*, 429 U.S. 274 (1977) 13
N.A.A.C.P. v. *Button*, 371 U.S. 415 (1963) 22
National Association of Letter Carriers v. *Sombrotto*, 449 F.2d 915 (2 Cir., 1971) 4
NLRB v. *Clark Bros. Co.*, 163 F.2d 373 (2 Cir. 1947) 21
NLRB v. *Mueller Brass Co.*, 509 F.2d 704 (5 Cir., 1975) 21
NLRB v. *Threads, Inc.*, 308 F.2d 1 (4 Cir., 1962) .. 21
New York ex rel. Bryant v. *Zimmerman*, 278 U.S. 62 (1928) 10
Parks v. *International Brotherhood of Electrical Workers*, 314 F.2d 886 (4 Cir., 1963), cert. denied, 372 U.S. 976 ..... 17, 18
Pignotti v. *Local #3 Sheet Metal Workers' Int. Ass'n*, 477 F.2d 825 (8 Cir.), cert. denied, 414 U.S. 1067 (1973) 18

TABLE OF AUTHORITIES—Continued

	Page
Retail Clerks Union, Local 648 v. *Retail Clerks International Association*, 299 F.Supp. 1012 (D.D.C., 1969)	19
Rust Sales Company, 157 NLRB 1681 (1966)	21
Sablosky v. *Budzanoski*, 457 F.2d 1245 (3 Cir., 1972), cert. denied, 409 U.S. 853	18
Scofield v. *NLRB*, 394 U.S. 423 (1969)	16
Steele Apparel Co., Inc., 172 NLRB 903 (1968), enforced on point, 437 F.2d 933 (8 Cir., 1971)	21
Steelworkers v. *Usery*, 429 U.S. 305 (1977)	22
Super Tire Engineering Co. v. *McCorkle*, 416 U.S. 115 (1974)	11, 22
Turner v. *Air Transport Lodge 1894, Etc.*, 590 F.2d 409 (2 Cir., 1978), cert. denied, 442 U.S. 919	23
United Bro. of Carpenters & Joiners of America v. *Brown*, 343 F.2d 872 (10 Cir., 1965)	15, 18
United States v. *Boyle*, 482 F.2d 755 (D.C. Cir., 1973), cert. denied, 414 U.S. 1076	20
United States v. *Di Re*, 332 U.S. 581 (1948)	11
United States v. *DuPont & Co.*, 366 U.S. 316 (1961)	13
United States v. *Ryan*, 320 F.2d 500 (6 Cir., 1963)	19
Wallace Press, Inc., 146 NLRB 1236 (1964)	21
Wirtz v. *Bottle Blowers Assn.*, 389 U.S. 463 (1968)	15, 16
Wong Sun v. *United States*, 371 U.S. 471 (1963)	11

STATUTES AND RULES

28 U.S.C. § 1254(1)	2
Labor Management Relations Act of 1947	
Section 301(a), 29 U.S.C.A. § 185(a)	4
Labor Management Reporting and Disclosure Act of 1959, as amended 78 Stat. 519, 29 U.S.C. § 401 et seq.	2

TABLE OF AUTHORITIES—Continued

Page

Section 3(h), 29 U.S.C.A. § 402(h) 3, 15, 16, 17, 18, 19
Section 3(i) (j), 29 U.S.C.A. § 402(i) (j) 3
Section 201(a), 29 U.S.C.A. § 431(a) 2
Section 302, 29 U.S.C.A. § 462 ..... 2, 20
Section 304(a) (c), 29 U.S.C.A. § 464(a) (c).....2, 3, 4, 20
Section 501(a), 29 U.S.C.A. § 501(a) 3, 20
Section 601, 29 U.S.C. § 521 19
Section 609, 29 U.S.C.A. § 529 ..... 3, 20
Rule 13(a), Fed. R. Civ. P. 4

MISCELLANEOUS:

Black's Law Dictionary (Fourth Ed., 1961) 16
Horowitz, *Possible Effects of LMRDA's Trusteeship Provisions*, in Slovenko, *Symposium on LMRDA* (1961) 458 15
Landrum-Griffin and the Trusteeship Imbroglio, 71 Yale L.J. 1460 (1962) 15
Levitan, *The Federal Law of Union Trusteeship*, in Slovenko, *Symposium on LMRDA* (1961) 443.... 15
Stern & Gressman, *Supreme Court Practice* (5th Ed.) 11
Union Trusteeship, A Report to the Congress by the Secretary of Labor, p. 153 15
Webster's Dictionary of Synonyms (G. & C. Merriam & Co., 1951) 16
Webster's Third New International Dictionary (unabridged, 1965) 16

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, Retail Store Employees Union, Local 919 (hereinafter Local 919), Arnaldo F. Espinosa, its President, and the other officers of Local 919, defendants-appellants below, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on November 26, 1979.

OPINIONS BELOW

The opinion of the Court of Appeals, 23a-24a, *infra*, is unpublished, 614 F.2d 1291. The opinion of the Dis-

trict Court, 4a-20a, *infra*, is reported unofficially at 104 LRRM 2089.

JURISDICTION

A timely petition for rehearing and a suggestion for rehearing *in banc* of the judgment and opinion entered November 26, 1979, were denied on January 23, 1980, 25a-28a. On April 8, 1980, Mr. Justice Marshall entered an order extending the time for filing a petition for certiorari to and including May 22, 1980, and this petition was filed prior to that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Does the Labor Management Reporting and Disclosure Act of 1959, as amended, 78 Stat. 519, 29 U.S.C. § 401 *et seq.*, hereinafter the Act or LMRDA, legalize or prohibit discriminatory and unlawfully motivated audit of an autonomous subordinate body by its parent labor organization?

STATUTORY PROVISIONS INVOLVED

The text of the relevant provisions of the Act is set out in the Statute Appendix, 1a-3a, *infra*. Synopsized, the Act provides that "[e]very labor organization shall adopt a constitution and bylaws" (Section 201(a), 29 U.S.C.A. § 431(a)); prohibits imposition of trusteeship by a parent labor organization over a subordinate body except "in accordance with the constitution * * * of the organization which has assumed trusteeship over the subordinate body and for the purpose of correcting corruption or financial malpractice * * *" (Section 302, 29 U.S.C.A. § 462); illegalizes, and authorizes members and subordinate bodies to sue to enjoin, trusteeships which are not "established * * * in good faith for a purpose allowable under Section 302" (Section 304(a), (c), 29 U.S.C.A.

§ 464(a), (c)); defines "trusteeship" as "any * * * method of supervision or control whereby a labor organization suspends the autonomy otherwise available to a subordinate body under its constitution * * *" (Section 3(h), 29 U.S.C.A. § 402(h)); declares that union offices are "positions of trust in relation to [the labor] organization and its members as a group"; requires officers to administer the organization's affairs "in accordance with its constitution * * *" and "solely for the benefit of the organization and its members" (Section 501(a), 29 U.S.C.A. § 501(a)); and makes it unlawful for officers of a labor organization to in any manner "discipline any of its members, for exercising any right to which he is entitled under the provisions of this Act" (Section 609, 29 U.S.C.A. § 529).

STATEMENT OF THE CASE

This case arises out of a suit filed by United Food and Commercial Workers International Union (hereinafter UFCW), successor to Retail Clerks International Association, William H. Wynn, its President and its other officers, to enforce a trusteeship against Local 919, an autonomous subordinate body of UFCW, with headquarters in Hartford, Connecticut (5a-6a). Both UFCW and Local 919 are "labor organizations" within the meaning of Section 3(i) and (j) of the Act, 29 U.S.C.A. § 402(i) and (j) (5a-6a, 11a-13a).

UFCW filed suit on July 3, 1979, and simultaneously applied *ex parte* for a temporary restraining order to enforce the trusteeship it had imposed on Local 919 on July 2, 1979, effective July 3, 1979 (J.A. 2, 55-61, 219).[1]

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[1] The symbol "J.A." refers to the Joint Appendix in the court below. The symbol "R.A." refers to the "Reply Appendix" to petitioners' reply brief in the court below. "Tr.

Jurisdiction was invoked under Section 304(c) of the Act, 29 U.S.C.A. § 464(c), and Section 301(a) of the Labor Management Relations Act of 1947, (LMRA) 29 U.S.C.A. § 185(a).[2] Local 919 counterclaimed (4a; J.A. 10-18, 19), for injunctive, declaratory and other relief, including damages and attorneys' fees and costs on the ground that the trusteeship had not been imposed in good faith for the ostensible purpose of "correcting corruption or financial malpractice," but for the purpose of ousting Espinosa from office because of Wynn's personal animus against him arising out of Espinosa's refusal to submit to Wynn's dictates in the Local's internal affairs, and that the audit upon which the charge of "corruption or financial malpractice" was based was undertaken discriminatorily, in bad faith, for the purpose of providing a pretextual foundation for a charge of "corruption or financial malpractice."

Vol. ——" refers to portions of the stenographic transcript of the hearing on the motion for preliminary injunction not included in either appendix.

[2] Section 304(c) contains no provision for suit by a parent body to enforce a trusteeship allegedly properly imposed for a purpose enumerated in Section 302. It provides only for suits by "subordinate bodies" for injunctive and other relief against trusteeships threatened or imposed by a parent body in an unlawful manner or for an unlawful purpose. It has been held, however, that jurisdiction of an action by a parent body to enforce a trusteeship lies under Section 301(a) of the LMRA and that LMRDA Section 304(c) does not defeat LMRA Section 301 jurisdiction. *National Association of Letter Carriers* v. *Sombrotto*, 449 F.2d 915, 918-919 (2 Cir., 1971). Where, as in this case, a parent body initiates the action, the subordinate body is compelled to seek the injunctive and other relief for which the statute provides by way of counterclaim under Rule 13(a), Fed. R. Civ. P. (11a-13a, 19a).

A. The District Court's Findings, Conclusions and Order

In its opinion and order of July 23, 1979, the District Court specifically found:

(1) "The trusteeship was not imposed for any of the purposes permitted by federal law, but instead was imposed in bad faith by the UFCW in an attempt to oust the president of Local 919 from his office." (5a; 18a, 19a);

(2) "The entire factual background indicates that UFCW was using the audit as a pretext to remove Espinosa and take over the Local, because of the personal difficulties which had arisen between him and Wynn" (19a);

(3) The "difficulties" reflected Wynn's personal animosity toward Espinosa stemming from Espinosa's refusal to submit to Wynn's dictates in matters of Local 919's internal affairs (8a-9a);[3]

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[3] The court described these as follows (*id.*):

"Espinosa had refused to appoint Joe DiFlumera, who had been removed as president of the Springfield, Massachusetts local, to a position on the staff of Local 919. DiFlumera is now employed by the International as a representative in the Boston area. Epinosa had also refused the request of Wynn and Dority that he appoint a Richard Abdow trustee of Local 919's joint union employer pension and welfare funds. Espinoso had declined to recommend the removal of Attorney Richard Van Duren as counsel for said welfare funds, despite Wynn's dissatisfaction with Van Duren. Wynn had also disapproved of Espinosa's running for election as a director of the International Foundation of Welfare Benefit Plans, an organization engaged in education of labor, management and public participants in jointly administered health and welfare pension matters."

It is undisputed that the matters in which Wynn attempted to interfere are, by the UFCW Constitution, committed exclusively to local control.

(4) "the International was not sincerely interested in auditing Local 919's books; its purpose was the removal of Espinosa" (19a);

(5) "the information found in the audit was insufficient to indicate corruption or financial malpractice" (17a);

(6) "Most of the claimed irregularities uncovered during the audit [14a-17a] could have been explained by the officers and employees of Local 919, if an explanation had been sought" (14a);

(7) "the trusteeship was not in fact imposed because of these claimed irregularities" (14a).

There is no evidence and no finding that but for Wynn's animus against Espinosa, and his need for a pretext to justify removal of Espinosa and take over of the Local, a recommendation or a decision to audit Local 919 would ever have been made. Article 11(M) of the UFCW Constitution provides (18a, n.4):

> The International Union shall have the authority, without notice, to obtain or make a *routine audit, inspection, or examination* of all books and records of any chartered body. The International Union is authorized to audit, inspect, or examine any of the books, records or other documents *as may be reasonable and necessary to assure that the laws or Code of Ethical Practices established by the International Executive Board are being respected.*" (Emphasis added.)

The District Court found that Wynn authorized the audit of Local 919 upon a recommendation from Vice President and Director of the Northeastern Region, Dority, assertedly based upon Dority's observation in a Local 919 trustees' report of "unusually high expenditures" for specified union business purposes and "hearsay rumors" of occasional non-union related personal expenditures (6a). There is no evidence that UFCW had

ever before undertaken to audit a local union or a local union official on such slight grounds.[4] What was decided upon and conducted was not a "routine" audit, but rather a "fraud audit" (7a, 18a-19a),[5] or investigation (R.A. 61-62).

Although UFCW employs a full-time auditor (J.A. 103-104), he was not used for the Local 919 audit. Instead, UFCW decided to and did retain a big-eight accounting firm, Touche Ross & Co. (6a, 16a; J.A. 247, 248).[6] However, far from giving Touche Ross a free hand, Dority sharply limited the materials it could review; dictated the subject matter of reports it would prepare; forbade it to consult Local 919's long-time certified public accountant, Kravet of Coopers Lybrand, and its bookkeeper, Micha, and prohibited it from making professional evaluations and judgments as to whether there was ground for finding financial misconduct or malpractice (Tr. Vol. I, 188-193, 202-203). In short,

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[4] To the contrary, the record shows (J.A. 163-164; Exh. S), that in the case of one local official, Joseph Sarbora, President of Local 1407, Pittsburgh, Pennsylvania, presumably a friend of Wynn, even after Sarbora's federal court conviction for massive fraud and embezzlement of local union funds, Wynn took no step to remove him from office or place his local in trusteeship until Sarbora himself asked for a trusteeship.

[5] In the context of audit, the term "routine" is generally understood to mean "automatic" or "in normal course". *E.g.*, *Mincy* v. *District of Columbia*, 218 A.2d 507, 508 (D.C. App., 1966) ("routine interrogation"); *Delaware* v. *Prouse*, 440 U.S. 648, 650-51 (1979) ("routine" stop). "Routine" is used in this sense in the first sentence of Article 11(M), where it contrasts with the power "to audit, inspect, or examine" conferred in the second sentence.

[6] The record shows only one prior occasion on which the International ever retained an outside accounting firm to audit a local union (J.A. 162; Exh. Q-1).

the "fraud audit" was a "witch hunt" (J.A. 110, 116), or frame-up (R.A. 61-62; p. 11, n. 9 *infra*).

The trial court found that Dority and his executive assistant, Novicoff, deliberately deceived Espinosa as to the "true purpose" and kind of audit which was to be conducted (7a, 18a-19a), and falsely charged Espinosa with: (1) intentionally "double billing" by submitting "both the soft copy and the hard copy of credit card billing slips" (14a-15a); (2) violating a non-existent expense documentation requirement (15a); and (3) failing to satisfy the UFCW Constitution's "itemized statement" requirement (15a-17a).

The District Court also found that UFCW used the audit as a cover for take over of the Local by stealth or by force (8a, 9a, 18a-19a). Novicoff tried to gull Micha into giving Novicoff a key to Local 919's office for use in gaining entry on Saturday and Sunday, when it was known that no Local 919 employee would be present (8a, 9a), by misrepresenting to Micha that "Espinosa had authorized Dority to have a key to the office" (*id.*). Initially, upon being informed of the audit, Espinosa "readily consented, expressed his cooperation and so instructed the Local's personnel. He interfered only when it became apparent that he had been deceived as to the purpose of the audit" (18a). At that point, Espinosa "anticipated and feared the imposition of a trusteeship without notice and the actual strong-arm physical takeover of the Local's premises by Dority and his aides" (8a). Upon advice of counsel, he barred their access to Local 919's premises (*id.*).

One of the asserted grounds for trusteeship was that by barring access Espinosa had "interrupted UFCW's union audit" (17a; J.A. 219). The district court opined that this was the "most serious charge made against

Espinosa" (17a). The court found Espinosa's interruption of the audit "unwarranted" because (17a-18a):

> "Article 11(M) of the International's constitution grants it *an unqualified right* to audit the Local's books at any time without notice. Therefore, Espinosa's interruption of the audit was a clear violation of the International's constitution * * *."[7] (Emphasis added.)

The court concluded that this constitutional violation did not warrant trusteeship, however, because Espinosa (18a):

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[7] Petitioners from the very beginning charged that the audit was outlawed by the Act because it was discriminatory and illegally motivated and that Article 11(M) of the UFCW Constitution does not, and cannot legally be construed to, authorize discriminatory, illegally motivated, audits. Transcript of Proceedings in Chambers on July 3, 1979, pp. 17-18; Opening Statement of Defendants' Counsel, Tr. Vol. I, pp. 32-35 (July 6, 1979) (R.A. 34-37); Defendants-Counterclaimants' Memorandum of Law in Support of Proposed Findings of Fact, Conclusions and Order, pp. 7-8 (July 17, 1979) (R.A. 4-11); Transcript of Proceedings of July 31, 1979, pp. 13-15 (R.A. 50-52).

Petitioners immediately contested Judge Clarie's interpretation of Article 11(M) as conferring an "unqualified right" to audit. Defendants' Memorandum in Support of Motion for Stay Pending Appeal and Injunction Pending Appeal, pp. 3-7 (July 25, 1979) (R.A. 13-17); Emergency Motion [to the Court of Appeals] for Stay and Injunction Pending Appeal, pp. 3-5 (July 26, 1979) (R.A. 19-21); Defendants-Appellants' [telegraphed] Reply to Opposition [to Motion for Stay] ¶ 7 (July 27, 1979) (R.A. 21); Emergency Motion [to Hon. Thurgood Marshall] for Stay Pending Appeal and for Stay of Order Requiring Defendants to Show Cause at 10:00 a.m., July 31, 1979, Why They Should Not be Held in Contempt, p. 5-9 (July 30, 1979) (R.A. 25-29); Transcript of Proceedings of July 31, 1979, pp. 6-18 (R.A. 43-55).

> "took that action in good faith, believing the audit to be a frame-up or a pretext to oust him from his position as local president and that it was designed as a mechanism for the International to assume control over the Local."

On the other hand, on the premise that Article 11(M) lawfully grants UFCW "an unqualified right to audit at any time," the court set aside the trusteeship, but only "on the basis of the present record" (19a); authorized UFCW to resume the audit and "impose a trusteeship at a later date if it develops credible facts to support such a move" (5a, 19a), and required Local 919 and its officers to submit to resumption of the audit instanter (*id.*; J.A. 43, 44).[8]

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[8] In his formal Order issued on July 31, 1979 (21a-22a), Chief Judge Clarie declined to include a provision proposed by petitioners (J.A. 47), declaring that Article 11(M), *inter alia*, is "not in conflict with the autonomy guaranteed local unions by Title III of the Landrum-Griffin Act" on the ground that the court had not found it necessary to pass upon Local 919's prayer for declaratory relief against the Constitutional provisions (J.A. 205-211). Petitioners also appealed from that Order (J.A. 50). Inasmuch as the validity of Article 11(M) as construed by the District Court is the *sine qua non* of upholding resumption of the audit, the Order of July 23, 1979, necessarily rejects petitioners' claim of conflict. The effect of that Order as rejection cannot be avoided or obscured by the Court's refusal to consider the conflict claim in the context of a specific prayer for declaratory relief. Cf. *New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63, 67 (1928); *Davis* v. *Wechsler*, 263 U.S. 22, 24 (1923).

The trial court subsequently, on September 24, 1979, granted petitioners leave to file their amended counterclaim specifically requesting declaratory relief against Article 11(M) (among other Articles) of the UFCW Constitution, but it has not yet scheduled hearing on petitioners' motion for summary judgment thereon, although that motion has been pending since October 25, 1979.

Petitioners' motions to the District Court, to the Court of Appeals and to this Court for stay of the audit pending appeal were denied (J.A. 42, 43, 44, 212-213) and, under petitioners' protest, the audit resumed on August 1, 1979.[9]

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[9] The audit continues. On January 30, 1980, UFCW issued an interim report of its auditor which revealed that UFCW had been unable to substantiate any of the grounds for suspicion Dority originally advanced to justify the audit (6a) and reargued the contentions Judge Clarie had rejected (14a-17a).

Whatever the final outcome of the audit, it will not moot this case. If wrongdoing is found, adjudication of the validity of the audit *ab initio* will be unavoidable, for a "fraud audit," like any other kind of search for wrongdoing, "is not * * * made legal by what it turns up. In law it is good or bad when it starts and does not change character from its success." *United States* v. *Di Re*, 332 U.S. 581, 595 (1948); *Wong Sun* v. *United States*, 371 U.S. 471, 484 (1963). Petitioners submitted to resumption of the audit "under protest" and "the forced performance of acts sought to be enjoined [will not] render a case moot when the consequences of the conduct may be set aside if the injunction is subsequently granted." Stern & Gressman, *Supreme Court Practice* (5th Ed.), p. 892, and note 15, citing cases. The consequences envisioned by the District Court (J.A. 37), use of adverse findings to predicate imposition of a trusteeship, may certainly "be set aside," even if it is impossible in all respects to "unring the bell." *Maness* v. *Meyers*, 419 U.S. 449, 460 (1975).

If no wrongdoing is found the issue will remain justiciable because petitioners' counterclaims pray for award of damages and attorneys' fees (J.A. 14, 18) (*Memphis Light, Gas & Water Div.* v. *Craft*, 436 U.S. 1, 8-9 (1978)), and petitioners' counterclaim for a declaratory judgment that Article 11(M) as construed by the District Court is invalid is pending (J.A. 46, 48; p. 10 n.8, *supra*), *Super Tire Engineering Co.* v. *McCorkle*, 416 U.S. 115, 122-127 (1974). Respondents' potential liability for attorneys' fees under *Hall* v. *Cole*,

B. The Court of Appeals' Decision

The Court of Appeals, in a two sentence opinion, affirmed the District Court's order of July 23, 1979 (23a-24a):

> "We find no abuse of discretion in Chief Judge Clarie's order requiring Local 919 to submit to an audit pursuant to Article 11M of the International Constitution. The argument that an audit constitutes a trusteeship as defined in 29 U.S.C. § 402(h), is not persuasive."

In their petition for rehearing, petitioners demonstrated that this opinion obscures and evades rather than addresses the important questions of statutory construction presented (Pet. for Rehearing, pp. 1-2):

> "It is small wonder that the Court found 'unpersuasive' '[t]he argument that an audit constitutes a trusteeship as defined in 29 U.S.C. § 402(h).' For that is *not* 'the argument.' In even the narrowest terms, Local 919's argument is that an audit is a 'method of supervision or control' (Br. 20-21; R. Br. n. 6, p. 7), which, *if illegally motivated*, 'suspends the autonomy otherwise available to [the] subordinate body under [the UFCW] constitution * * *,' [within the meaning of § 402(h)] because the Constitution on its face does not purport to authorize (Br. 44-46; R. Br. 11), and cannot compatibly with Title III's local autonomy policy (Br. 21-47; R. Br. 13), and the implied obligation of good faith and fair dealing (R. Br. 13-14), be construed to authorize, audits for unlawful motives or to achieve forbidden ends. More broadly, and correctly, stated, the argument is that power to audit, even if not a 'method of supervision or control,' is not an 'unqualified right' as Judge Clarie held (JA

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412 U.S. 1 (1973), alone would prevent exoneration of Espinosa from mooting this case. *Deposit Guaranty National Bank* v. *Roper*, —— U.S. ——, No. 78-904, 48 L.W. 4279 (March 19, 1980).

> 36), but is, instead, subject to and qualified by LMRDA's prohibitions and policy against exertion of constitutional power by International officers against subordinate bodies and officials for unlawful motives, to achieve personal ends or in reprisal against exercise of statutory rights (Br. 21-30; R. Br. 9-12).
>
> To reject *this* argument is to hold that the audit power, unlike all other International powers, whether covered by § 402(h) or not (R. Br. 9), is exempt from LMRDA's local autonomy policy and from its prohibitions against abuse by International officers of their constitutional powers: that International officials may, in consequence, lawfully use audits as instruments of reprisal and persecution to bend and break elected local union officers to their will (Br. 27-28)."

Petitioners had argued on brief (p. 31), that if the discriminatory, illegally motivated, audit violated the Act, the courts below were obligated to enjoin, not authorize, its continuation or resumption. *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405, 415-422 (1975); *United States* v. *DuPont & Co.*, 366 U.S. 316, 326 (1961); *Labor Board* v. *Mexia Textile Mills*, 339 U.S. 563, 567-568 (1950). "A bar against resumption * * * is necessary 'to the assurance of those rights' which Title III protects. *Mt. Healthy City Board of Ed.* v. *Doyle*, 429 U.S. 274, 287 (1977)" (Br. p. 34). In their petition for rehearing (p. 6), petitioners said:

> "The issue, therefore, is not, as stated in the Opinion, whether Chief Judge Clarie's order is an 'abuse of discretion.' So to frame the issue is to misconceive both its substance and its importance. The actual issue is whether disregard or subordination of Congress' policy of protecting local autonomy and prohibiting abuse of International power [presumably in order] to maximize potential exposure [of] hypothetical corruption or financial malpractice exceeds judicial power."

REASONS FOR GRANTING THE WRIT

I. THE COURTS BELOW REJECTED APPLICATION OF THIS COURT'S ILLEGAL MOTIVE TEACHINGS TO THE ACT'S PROTECTION OF LOCAL AUTONOMY

This is a case of first impression. It is the first reported in which an audit was used discriminatorily by an International Union as a weapon of reprisal and discipline against the chief executive officer of a subordinate local for resisting dictation by the International President in local internal affairs, and to establish a plausible pretext for imposing a formal trusteeship upon the Local Union in order to oust him from office.

In *Labor Board* v. *Erie Resistor Corp.*, 373 U.S. 221, 227-228 (1963), this Court defined the role of findings of "subjective intent * * * to encroach upon protected rights" in the construction and application of statutes.

> "When specific evidence of a subjective intent to discriminate or [encroach] is shown, and found, many otherwise innocent or ambiguous actions which are normally incident to the conduct of a business [or of parent-subordinate body union affairs] may, without more, be converted [into illegal acts]. * * * Conduct which on its face appears to serve legitimate business [or union] ends in these cases is wholly impeached by the showing of an intent to encroach upon protected rights. The [actor's] claim of legitimacy is totally dispelled." (*id.*).

The failure and refusal of the courts below to apply this teaching to the findings of subjective illegal motivation and intent to encroach upon protected rights in this case should be reviewed by this Court because that failure and refusal frustrates and defeats Congressional policy in the important field of internal union affairs.

Title III was enacted to protect and effectuate under federal law "the right of the subordinate bodies to be

free from abusive use of [International] power." *Jolly* v. *Gorman*, 428 F.2d 960, 966 (5 Cir., 1970), *cert. denied*, 400 U.S. 1023. The object of Title III is "prevention of undue interference by national officers in the affairs of subordinate units * * *." Levitan, *The Federal Law of Union Trusteeship*, in Slovenko, *Symposium on LMRDA* (1961), 443. The policy is that "[l]ocal affairs are to be governed by local members under democratic processes." *United Bro. of Carpenters & Joiners of America* v. *Brown*, 343 F.2d 872, 882-882 (10 Cir. 1965).

Although the legality of unlawfully motivated audits has here surfaced for the first time, because illegal motive has not heretofore been shown or found, the danger that audit power would be abused by despotic officials of parent bodies was perceived from the very beginning. Levitan, *op. cit. supra*, pp. 443-444, 451; Horowitz, *Possible Effects of LMRDA's Trusteeship Provisions*, in Slovenko, *op. cit. supra*, pp. 459-460, 462-463; see also, *Landrum-Griffin and the Trusteeship Imbroglio*, 71 Yale L.J. 1460, 1470-1471 (1962). In 1962, the Secretary of Labor reported to Congress (*Union Trusteeships, A Report to the Congress by the Secretary of Labor*, p. 153):

> "The use of trusteeship may be only one part of a larger struggle for the assertion of control by the parent over the subordinate. The means of action in such disputes are not limited to trusteeship, or to opposition to it by the subordinate, but extend to the full range of powers either side may potentially use, and ultimately to the question of the continued existence of the subordinate body."

Congress defined "trusteeship" broadly in Section 3(h) to reach every power which may be used illegitimately to undermine local automony. Judicial interpretation must, if possible, prevent frustration of Congress' purpose. *Wirtz* v. *Bottle Blowers Assn.*, 389 U.S. 463, 475 (1968). "Congress, although committed to minimal intervention

[in internal union affairs] was obviously equally committed to making that intervention, once warranted, effective * * *." *Id.* at 473.

That perspective renders inadmissible the conclusion of the court below that discriminatory, illegally motivated, audit is not "trusteeship" as defined in Section 3(h). To begin with, audit is, even literally, a "method of supervision or control" of financial affairs.[10] Of course, non-discriminatory, legally motivated, audit of an antomonous subordinate body, if authorized by the parent body's constitution or bylaws, is nevertheless not "trusteeship", because it does not "suspend[] the autonomy otherwise available to a subordinate body under its constitution and bylaws." But discriminatory, illegally motivated, audit, whether authorized by the parent body's constitution or not, *is* "trusteeship," because a union constitution cannot legally authorize conduct which the terms or policy of the Act forbids. *Scofield* v. *NLRB*, 394 U.S. 423, 429-430 (1960).

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[10] *Black's Law Dictionary* (Fourth Ed., 1961), p. 166, col. 2, defines "audit" as an "official examination of an account or claim, comparing vouchers, charges, and fixing the balance." It defines "control" as "[p]ower or authority to * * * superintend * * * or oversee," *id.* at 399, col. 2. And it defines "supervision" as "inspection" (*id.* at 1607, col. 2). Webster's *Third New International Dictionary* (unabridged, 1965), defines "control" as "verification, scrutiny." *Id.* at 496, col. 3. The same work defines "audit" as "a formal or official examination and verification of books of account;" "a methodical examination and review of a situation or condition (as within a business enterprise) concluding with a detailed report of findings;" and "to audit" as "to examine and verify (as the books of account of a company or a treasurer's account)". *Id.* at 143, col. 1. Webster's *Dictionary of Synonyms* (G. & C. Merriam & Co., 1951), p. 90, equates "audit" with "examination, inspection, scrutiny, scanning," and lists "control" as an anologous word.

Courts are required to strike down any clauses or provisions of Union constitutions which are inconsistent with "existing Congressional [local autonomy] policy." *Parks* v. *International Brotherhood of Electric Workers*, 314 F.2d 886, 917 (4 Cir., 1963), *cert. denied*, 372 U.S. 976; *Brotherhood of Painters* v. *Brotherhood of Painters, L.U. 127*, 264 F.Supp. 301 (N.D. Cal., 1966). A parent body's constitution may not lawfully deprive autonomous subordinate bodies of autonomous status. *Monborne* v. *United Mine Workers*, 342 F.Supp. 718 720-722 (W.D. Pa., 1972); *Cross* v. *Mine Workers*, 82 LRRM 2614 (S.D. Ill., 1973). The policy of Title III, Title V and Section 609 of the Act forbids authorizing International officials to utilize any method of "supervision or control" to usurp local autonomy or to punish local officials for refusing to yield to parental dictation in local internal affairs. Any constitutional provision purporting to do so is therefore a nullity, p. 23, *infra*.

The language and policy of the Section 3(h) definition suffice to reach any suspension of autonomy, however partial or temporary. The distinction between discriminatory, or unlawfully motivated, audits and nondiscriminatory, lawfully motivated, ones, which the court below refused to draw, is thus implicit in Section 3(h) and essential to its proper construction. To effectuate Congress' policy, Section 3(h) must be construed to permit parent bodies to audit only to serve "legitimate" parent body interests, never "arbitrarily or capriciously" (*Jolly* v. *Gorman*, *supra*, 428 F.2d at 966); never to interfere with local control of local internal affairs, and never as a pretext, or as part and parcel of a plan, to impose trusteeship for an unlawful reason.[11]

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[11] *Benda* v. *Grand Lodge of Intern. Ass'n, Etc.*, 584 F.2d 308, 316-317 (9 Cir. 1978), *cert. dismissed*, 441 U.S. 937

II. EVEN ON THE ASSUMPTION THAT DISCRIMINATORY, UNLAWFULLY MOTIVATED, AUDIT IS NOT A "TRUSTEESHIP," THE DECISION BELOW CONFLICTS IN PRINCIPLE WITH DECISIONS OF OTHER CIRCUITS AND WITH FUNDAMENTAL TEACHINGS OF THIS COURT

In treating the Section 3(h) definition as if that were the end of the matter, the decision of the court below is in square conflict with *Parks* v. *International Brotherhood of Electrical Workers, supra.* The *Parks* court held that although charter revocation does not constitute imposition of "trusteeship" as defined in Section 3(h), because revocation effects dissolution rather than "suspen[sion of] autonomy," revocation cannot legally "be used as a means of evading the trusteeship provisions of Title III." 314 F.2d at 924 and note 78. That holding is dictated by the seminal teaching of this Court that no power, however unfettered, may be used "as an instrument for circumventing a federally protected right." *Gomillion* v. *Lightfoot,* 364 U.S. 339, 347 (1960). Therefore, even if it were arguable that audit is too small an invasion to be considered a "suspen[sion of] autonomy" for the purposes of Section 3(h), discriminatory, illegally motivated, audits would still be condemned by the policy of Sections 501 and 609.

(1979); *United Bro. of Carpenters & Joiners of America* v. *Brown, supra,* 343 F.2d at 882-883; *Pignotti* v. *Local #3 Sheet Metal Workers' Int. Ass'n,* 477 F.2d 825, 831, 832-836 (8 Cir.), *cert. denied,* 414 U.S. 1067 (1973); *Sablosky* v. *Budzanoski,* 457 F.2d 1245, 1248, 1250-1251 (3 Cir., 1972), *cert. denied,* 409 U.S. 853; *McDonald* v. *Oliver,* 525 F.2d 1217, 1232 (5 Cir., 1976), *cert. denied,* 429 U.S. 817; *Brotherhood of Painters* v. *Brotherhood of Painters, supra; Council #61* v. *AFSCME,* 80 LRRM 2942, 2954 (D.N.J., 1972) (not officially reported), *rev'd on other grounds,* 478 F.2d 1156 (3 Cir., 1973), *cert. denied,* 414 U.S. 975; *Monborne* v. *United Mine Workers, supra; Cross* v. *Mine Workers, supra.*

Section 3(h) does not exhaust the scope of Congressional concern with protection of local autonomy against despotic officials of parent bodies.[12] "[I]t is the entire Act, and not merely one portion of it, which embodies the definitive statement of national policy". *Machinists Local* v. *Labor Board*, 362 U.S. 411, n. 7 at 418 (1960). "It may be asserted without fear of contradiction, that the interest in [local autonomy] is one of those given large recognition by the Act * * *." *Id.*, at 428.

The only apparent, albeit unarticulated, explanation for immunizing discriminatory, illegally motivated, audits from the reach of the Act is that even such audits may uncover "corruption or financial malpractice." But that is to make the end justify the means. That Nietzschean philosophy is at war with a most fundamental premise of our legal system, as expounded by this Court in *Erie Resistor*, *supra*, p. 14. Courts are empowered to prevent *even public officials* from conducting audits and financial investigations "for any improper purpose." *Goldberg* v. *Truck Drivers Local Union No. 299*, 293 F.2d 807, 813 (1961) (Secretary of Labor under LMRDA § 601, 29 U.S.C. § 521). Authority exists only if "the investigation is being made *in good faith* for one of the purposes authorized by the statute * * *." *United States* v. *Ryan*, 320 F.2d 500, 502 (6 Cir. 1963) (Internal Revenue Service) (emphasis added.) Was former President Nixon's transmittal of his "enemies list" to the Internal Revenue Service lawful? If even public

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[12] E.g., *Johnson* v. *Nelson*, 325 F.2d 246 (8 Cir., 1963); *Cooke* v. *Orange Belt Dist. Council of Painters*, 529 F.2d 815, 819 (9 Cir., 1976), and cases cited; *Retail Clerks Union, Local 648* v. *Retail Clerks International Association*, 299 F.Supp. 1012, 1021-1022, 1024 (D.D.C., 1969); *Local No. 1 ACA; Etc.* v. *IBT., C.W. & H.*, 419 F.Supp. 263, 272-274 (E.D. Pa., 1976), *aff'd*, —— F.2d ——, 103 LRRM 2268 (3 Cir. 1980).

officials are not allowed to conduct fraud audits and financial investigations in bad faith and for improper purposes, *a fortiori* must courts prevent such conduct on the part of union officials, against whose potential abuses of power Congress found it necessary specially to legislate. Rejection of the *Erie Resistor* philosophy, moreover, is at war with Congress' approach in this very statute to the problem of "correcting corruption or financial malpractice", 29 U.S.C.A. § 462.

Congress recognized that trusteeships are necessary to "correct[] corruption or financial malpractice". Nevertheless, it prohibited imposition of trusteeship *as a pretext* for correcting "corruption or financial malpractice," or in bad faith (29 U.S.C.A. §§ 462, 464(c)), even though, as a result, existing corruption or financial malpractice will go uncorrected. Whether a discriminatory or illegally motivated audit is considered part and parcel of a scheme to impose illegal trusteeship, or as a means of circumventing or evading the prohibition against illegally motivated trusteeship, or as discipline imposed in violation of Section 609 in reprisal against protected resistance to interference with local autonomy, or as breach of officers' fiduciary duty under Section 501 to exercise official power only for lawful ends,[13] its judicial legalization to maximize potential exposure of hypothetical corruption or financial malpractice cannot be reconciled with Congress' preference for other interests and other values. Congress' resolution of the competing interests leaves no room for judicial reevaluation. *Machinists Local* v. *Labor Board, supra*, 362 U.S. at 429.

Fraud audit or investigation is a search for financial wrongdoing. When discriminatory or illegally motivated,

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[13] *United States* v. *Boyle*, 482 F.2d 755, 764 (D.C. Cir. 1973), *cert. denied*, 414 U.S. 1076; *Johnson* v. *Nelson, supra*, 325 F.2d at 653 (8 Cir., 1963).

such a search is no less unlawful interference with local autonomy than a similarly discriminatory or illegally motivated search designed to trap or frame a union supporter is unlawful interference with rights protected by the National Labor Relations Act. *NLRB* v. *Threads, Inc.*, 308 F.2d 1, 11 (4 Cir., 1962); *NLRB* v. *Mueller Brass Co.*, 509 F.2d 704, 708 (5 Cir., 1975). A holding that International officials are "privileged" to audit for illegal motives, or in reprisal against activity which LMRDA protects is not less likely "to deter" local officers from resisting usurpation of their protected autonomy by officials of the parent body than "[a] ruling that the employer was privileged to engage in intentional eavesdropping would be likely to deter free discussion by employees of self-organizational matters." *NLRB* v. *Clark Bros. Co.*, 163 F.2d 373, 375 (2 Cir., 1947). Just as discriminatory or illegally motivated "[s]urveillance becomes illegal because it indicates an employer's opposition to unionization * * *" (*Hendrix Manufacturing Company* v. *NLRB*, 321 F.2d 100, 104, n. 7 (5 Cir., 1963)), so does discriminatory or illegally motivated audit become illegal because it indicates the parent body's opposition to local autonomy. *Cannon Electric Company*, 151 NLRB 1465, 1469 (1965), quoting *Wallace Press, Inc.*, 146 NLRB 1236, 1238-1239 (1964); *Steele Apparel Co., Inc.*, 172 NLRB 903, 907 (1968), enforced on point, 437 F.2d 933 (8 Cir., 1971); *Rust Sales Company*, 157 NLRB 1681, 1683 (1966).

Courts are not authorized to carve out an exception from the scope and policy of the NLRA for illegally motivated surveillance or credit or theft investigations. *Steele Apparel* and *Rust* cases, *supra*. By the same token, they are not authorized to carve out an exception for illegally motivated fraud audits or investigations from the scope and policy of LMRDA. Doing so shrivels and blunts the protection Congress deemed necessary to assure

local autonomy and cabins the inhibitions Congress deemed necessary to impose upon abuse of power by National and International union officials.

III. CERTIORARI SHOULD BE GRANTED TO IMPLEMENT THE BALANCE CONGRESS STRUCK BETWEEN PROTECTION OF LOCAL AUTONOMY BY LAW AND AVOIDANCE OF UNDUE INTERFERENCE IN INTERNAL UNION AFFAIRS

This Court has not previously considered the balance Congress struck between the competing values of protection of local autonomy by law and preservation to labor organizations of power to control their internal affairs. It is of large moment that the Court do so now, in this case, because the decision below chills the freedom of officers of all autonomous subordinate bodies in the labor movement to exercise independence in their conduct of purely local business. *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 433 (1963); *Super Tire Engineering Co.* v. *McCorkle*, 416 U.S. 115, 122 (1974). Unless abusive parent body audits are condemned by this Court, local officers will be cowed into submission by their potential, recreating the very serfdom against which the Act is aimed.

An audit provision is a feature of virtually every National and International Union Constitution. Whether such a provision can lawfully by construed as authorizing discriminatory, illegally motivated, audits is "an important [question] of first impression under the LMRDA." *American Federation of Musicians* v. *Wittstein*, 379 U.S. 171, 175 (1964); cf. *Steelworkers* v. *Usery*, 429 U.S. 305, 307, n. 3 (1977).

IV. UNEXPLICATED DISREGARD OF THIS COURT'S TEACHINGS WARRANTS EXERCISE OF THE SUPERVISORY POWER OF THIS COURT.

Sub silentio rejection of fundamental teachings of this Court by the courts below calls for exercise of this Court's power of supervision. On the underlying legal question—whether authorization under a union constitution immunizes conduct which the Act in terms and policy condemns—the decision below conflicts with other decisions of the Second Circuit itself. *Turner* v. *Air Transport Lodge 1894, Etc.*, 590 F.2d 409, 411 (2 Cir., 1978), *cert. denied*, 442 U.S. 919 (a union constitutional provision cannot legalize what "the plain words of LRMDA forbid"),; *id.* at 412, n. 1 and accompanying text (Mulligan, J. concurring): ("Of course, since union constitutions and rules are formulated and enforced by the union, a private entity," they are subordinate to statutory law and policy); *Hurwitz* v. *Directors Guild*, 364 F.2d 67, 73 (2 Cir., 1966), *cert. denied*, 385 U.S. 971 (union constitutions and bylaws are subordinate at common law to public policy and the demands of "natural justice"). The approach taken in this case is in glaring contrast to that of the District of Columbia Circuit in *Local U. 13410, United Mine Workers* v. *United Mine Workers*, 154 U.S. App. D.C. 332, 340, 475 F.2d 906, 914 (1973), which joined the Fifth Circuit in *Jolly* v. *Gorman, supra*, in declaring: "This court will not frustrate the clear intent of Congress by making the remedies available to the Local less effective than they were before Congress acted."

CONCLUSION

Congressional protection of local union autonomy is an important subject which this Court has not previously had occasion to explore. It should do so now. This petition should be granted.

Respectfully submitted,

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May 20, 1980

APPENDIX

STATUTE APPENDIX

Relevant provisions of the Labor Management Reporting and Disclosure Act of 1959, as amended, 78 Stat. 515, 29 U.S.C. 401, *et seq.*, are as follows:

> Sec. 201. (a) Every labor organization shall adopt a constitution and bylaws * * *
>
> Sec. 302. Trusteeships shall be established and administered by a labor organization over a subordinate body only in accordance with the constitution and bylaws of the organization which had assumed trusteeship over the subordinate body and for the purpose of correcting corruption or financial malpractice, assuring the performance of collective bargaining agreements or other duties of a bargaining representative, restoring democratic procedures, or otherwise carrying out the legitimate objects of such labor organization.
>
> * * * *
>
> Sec. 304. (a) * * * Any member or subordinate body of a labor organization affected by any violation of this title (except section 301) may bring a civil action in any district court of the United States having jurisdiction of the labor organization for such relief (including injunctions) as may be appropriate, * * *.
>
> (c) In any proceeding pursuant to this section a trusteeship established by a labor organization in conformity with the procedural requirements of its constitution and bylaws and authorized or ratified after a fair hearing either before the executive board or before such other body as may be provided in accordance with its constitution or bylaws shall be presumed valid for a period of eighteen months from the date of its establishment and shall not be sub-

ject to attack during such period except upon clear and convincing proof that the trusteeship was not established or maintained in good faith for a purpose allowable under section 302.

Sec. 3(h) "Trusteeship" means any receivership, trusteeship, or other method of supervision or control whereby a labor organization suspends the autonomy otherwise available to a subordinate body under its constitution or bylaws.

Sec. 501. (a) The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization. A general exculpatory provision in the constitution and bylaws of such a labor organization or a general exculpatory resolution of a governing body purporting to relieve any such person of liability for breach of the duties declared by this section shall be void as against public policy.

Sec. 609. It shall be unlawful for any labor organization, or any officer, agent, shop steward, or other representative of a labor organization, or any employee thereof to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of this Act. The provisions of section 102 shall be applicable in the enforcement of this section.

Sec. 102. Any person whose rights secured by the provisions of this title have been infringed by any violation of this title may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Civil No. H-79-384

[Filed July 23, 1979—4:37 P.M.]

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION; WILLIAM H. WYNN; SAMUEL J. TALARICO; HARRY R. POOLE; THOMAS G. WHALEY; JAY H. FOREMAN and DOUGLAS H. DORITY,

Plaintiffs,

—vs.—

RETAIL STORE EMPLOYEES UNION LOCAL NO. 919; ARNALDO F. ESPINOSA; BERNARD MAGNANT; JAMES LOOKE; RENE PISANI; VIOLET LANGUELL; ESTHER RAVOSA; JOSEPH GAGNON; ALFRED KROOPNECK and GORDON SOUCY,

Defendants.

RULING ON CROSS-MOTIONS FOR PRELIMINARY INJUNCTION

This case arises from the attempt of an international union to impose a trusteeship over one of its chartered locals for the avowed purpose of preventing corruption and financial malpractice within the local union. The plaintiffs, the United Food and Commercial Workers International Union ("UFCW") and its officers, seek a preliminary injunction restraining the officers and employees of Retail Store Employees Union Local No. 919 ("Local 919") from interfering with the trusteeship imposed by UFCW over Local 919 on July 3, 1979. The defendant [2] on the other hand, request in their counterclaim a preliminary injunction enjoining the International from implementing the trusteeship. The Court concludes,

after hearing five days of testimony on the issues, that the trusteeship was not imposed for any of the purposes permitted by federal law, but instead was imposed in bad faith by the UFCW in an attempt to oust the president of Local 919 from his office. The Court accordingly denies the plaintiffs' motion for preliminary injunction and grants that of the defendants. Nevertheless, the Court orders the officers of Local 919 to permit the UFCW to proceed with its audit of the Local's books and records, as provided in the UFCW's constitution. Furthermore, the Local's officers are directed to return all funds which were temporarily removed from bank accounts in the Hartford area for the purpose of safeguarding them, back to their original depositories.

Statement of Facts

The United Food and Commercial Workers International Union is the successor to the Retail Clerks International Association and is a labor organization within the meaning of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C.A. § 402(i) and (j) and §§ 462 and 464.[1] William H. [3] Wynn is the president of UFCW and the plaintiffs Wynn, Samuel J. Talarico, Harry R. Poole, and Jay H. Foreman constitute its executive committee. The plaintiff Douglas H. Dority is UFCW's vice-president and the director of its North-

[1] The UFCW constitution was adopted in June 1979 by special merged conventions of the Retail Clerks International Union and the Amalgamated Meat Cutters and Butcher Workmen of North America, which voted to merge into a unified organization to be governed by the terms of the UFCW constitution. The UFCW constitution's provisions with respect to local union financial obligations and structure are largely identical to those of the RCIU's constitution. Many of the events which occurred in this case occurred prior to the merger and thus were governed by the RCIU Constitution (Plaintiff's Exhibit 1).

eastern Region. Local Union 919 is a chartered body of the plaintiff UFCW and has its principal office in Hartford, Connecticut. Named as defendants in this action are Local 919, Arnaldo F. Espinosa, its president, and other officers of the Local.

Dority testified that, in the normal course of his duties as director of the Northeastern Region, he had reviewed the trustees' report of Local 919 and noted unusually high expenditures for printing, local union awards, promotional items, building repairs and for liquor during the month of December, 1978. He said that he had been advised by one Joe DiFlumera, a former chief executive officer of the Springfield, Massachusetts local, that he had been in the company of Espinosa on trips outside of Hartford on non-union related purposes, when Espinosa expended local union funds for himself and guests. He also said that he had seen him on two occasions at convention locations with female company and that similar hearsay rumors had reached him from other sources. Dority stated that based on the trustees' [4] report, and this hearsay information, he directed a letter on June 15, 1979 to President Wynn, requesting permission to conduct an audit of Local 919's books and records, pursuant to Article 11(M) of the International constitution. This Article provides in relevant part:

> "The International Union shall have the authority, without notice, to obtain or make a routine audit, inspection, or examination of all books and records of any chartered body."

On June 25, 1979, International President Wynn directed a letter to Dority authorizing him to make provisions to conduct the audit.

On June 26, 1979, Dority, accompanied by his executive assistant Novicoff and members of the professional auditing firm of Touche Ross and Company, went to the

offices of Local 919 to conduct said audit. Showing the letter from President Wynn, Dority advised Espinosa that they intended to conduct the audit and that the purpose was to assist the local union in complying with the new federal laws and regulations. Espinosa agreed that the audit could be beneficial, and was a good idea and suggested that if anything were learned from it, it could be discussed at the next union seminar. The audit proceeded smoothly from Tuesday, June 26, through Friday, June 29, while President Espinosa was attending [5] a business related pension fund conference on the West Coast. He had planned to remain in California the following week on vacation. There was no apparent concern on his part that the audit was taking place. When Espinosa called in to the office during the week, the Local's bookkeeper advised him that a general audit was not in fact being conducted. The bookkeeper explained that special audits and accounting analysis were occurring in what appeared to be labeled as suspect areas, such as printing costs, leasing of cars, construction costs, local union awards, travel, and hotel expenses. Espinosa then learned for the first time that the audit was not for the purposes represented to him by Dority, but was in fact a fraud audit directed only at him personally.

President Espinosa communicated with Dority by telephone and the latter advised him that he should return to Hartford immediately, because there were several accounting discrepancies which indicated that the Local's records were not complete or correct. Dority told him that it was a serious matter and that he should give his immediate attention to it. Espinosa flew back to Hartford on Sunday, went to the Local's office and took home with him the carton of records which had been or were being photostated, so that his accountant might come to his house and review them. The accountant, Gordon Kravet, was not immediately available that day, but did come to Espinosa's home for that purpose on July 4, 1979.

[6] Dority requested that the audit continue on Saturday and Sunday, but after Espinosa learned from the bookkeeper that the nature of the audit was directed at him personally, he advised that the audit could not continue over the weekend, stating the office employees did not work Saturdays and Sundays. On Monday, July 2, 1979, Espinosa communicated with his legal counsel, advised him what had happened and inquired what steps he should take to protect the local union's interests. Espinosa anticipated and feared the imposition of a trusteeship without notice and the actual strong-arm physical takeover of the Local's premises by Dority and his aides. Upon the advice of counsel, he engaged off duty officers from the Hartford Police Department to guard the entrance to the Local's office building and gave him instructions to admit no one except officers and employees of Local 919. These instructions have been carried out since July 2, 1979.

In a telephone conversation on Monday, July 2, 1979, Espinosa requested that Dority communicate to Wynn his desire to meet with Wynn in Washington immediately; in fact, he practically begged him to arrange the meeting. Dority said he relayed the request to Wynn, who refused to meet with Espinosa or to discuss the matter with him. Espinosa then telegraphed his own request for a meeting and Wynn responded negatively. (Defendants' Exhibits 6, 7).

[7] Espinosa claims that he and President Wynn were not on good speaking terms, because of Espinosa's refusal to carry out certain demands which Wynn had made upon him concerning the internal affairs of Local 919. Espinosa had refused to appoint Joe DiFlumera, who had been removed as president of the Springfield, Massachusetts local, to a position on the staff of Local 919. DiFlumera is now employed by the International as a representative in the Boston area. Espinosa had also

refused the request of Wynn and Dority that he appoint a Richard Abdow trustee of Local 919's joint union employer pension and welfare funds. Espinosa had declined to recommend the removal of Attorney Richard Van Duren as counsel for said welfare funds, despite Wynn's dissatisfaction with Van Duren. Wynn had also disapproved of Espinosa's running for election as a director of the International Foundation of Welfare Benefit Plans, an organization engaged in education of labor, management and public participants in jointly administered health and welfare pension matters. As a result of their successive disagreements and Espinosa's apparent lack of cooperation, Espinosa claims that Wynn was hostile to him personally. He asserts that this dislike was not only expressed verbally on occasion, but was also manifested in Wynn's refusal to shake Espinosa's hand after the latter had finally consented to appointing Abdow within a period of one year.

[8] On Friday, June 29, the Local's bookkeeper, Roy Micha, advised Dority that the office would be closed Saturday and Sunday; however, Novicoff, Dority's assistant, told Micha that Espinosa had authorized Dority to have a key to the office. When Micha refused to give him a key, he claims Novicoff said "How are we supposed to get in, kick in a window?" Espinosa testified that Dority had not in fact asked him for a key and he had never offered to let him have one. When these circumstances were relayed by Micha to Espinosa that same day, the latter feared that the International was bent on imposing a trusteeship without a hearing and that they were likely to seize the building in which Local 919's business was conducted.

On July 2, 1979, the UFCW Executive Committee authorized Wynn, at his request, which was based upon information supplied by Dority, to impose a temporary trusteeship on Local No. 919. The effective date of the

imposition of the temporary trusteeship was July 3, 1979. Wynn appointed Dority trustee and authorized him to appoint one or more deputy trustees to assist him and to delegate such duties and responsibilities to them as he deemed advisable. The letter further authorized him to make a complete examination and audit of all books, records, funds, property and other assets of Local 919 and directed him to submit an audit and complete [9] report to the UFCW Executive Committee at the conclusion of said examination. The letter established July 31, 1979 as the date when a fair hearing would be convened to determine whether further maintenance of the trusteeship were unwarranted.

Espinosa has devoted much of his adult life to the cause of unionism. He came to the United States from Cuba in 1948 and was first employed as a dishwasher. He became affiliated with the Retail Clerks Association around 1954, while employed by the Stop & Shop grocery chain in the Hartford area. Espinosa was one of the founders of the union and has been a major force in the union for the past 25 years. By 1958 he had begun to devote his full time to the office of secretary-treasurer and business agent of the Retail Clerks Association. During Espinosa's years with the latter Association, it flourished from a small union covering four stores with 35 members, to a present union membership of 7,000 to 7,500 members, employed in 110 stores.

Jurisdiction

Subject matter jurisdiction to issue an injunction which seeks either to prevent the maintenance of an illegal trusteeship or to impose a trusteeship exists by virtue of § 304(a) of the Landrum-Griffin Act, 29 U.S.C. § 464(a). *National Association of Letter Carriers* v. *Sombrotto*, 449 F.2d 915, 918-19 (2d Cir. 1971).

[10] *Discussion of the Law*

The principal issue in this action is whether the imposition of a trusteeship by the UFCW over Local 919 is consistent with § 302 of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 462. That section provides:

> "Trusteeships shall be established and administered by a labor organization over a subordinate body only in accordance with the constitution and bylaws of the organization which has assumed trusteeship over the subordinate body and for the purpose of correcting corruption or financial malpractice, assuming the performance of collective bargaining agreements or other duties of a bargaining representative, restoring democratic procedures, or otherwise carrying out the legitimate objects of such labor organization."

The plain language of the statute makes it clear that two conditions must be present for the valid imposition of a trusteeship: first, the international must comply with its own constitution in establishing and administering the trusteeship; and second, the trusteeship can only be imposed for one of the reasons enunciated in the statute. *Executive Board Local 1302* v. *United Brotherhood of Carpenters*, 477 F.2d 612, 613 (2d Cir. 1973). As here is no contention that the UFCW did not comply with its constitution in imposing the trusteeship,[2] the

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[2] Article 9(K) of the International's constitution makes specific provision for imposing a trusteeship:

> "A trusteeship may be imposed by the International Union upon a chartered body to correct corruption or financial malpractice, including mishandling or endangering Union funds or property, or the funds of property of any trust in which the Union has an interest; assure the performance of collective bargaining agreements or

question before the Court is whether the purpose for which the trusteeship was imposed was one of those enumerated in the statute.

[11] It should be noted at the outset that the fact that the imposition of the trusteeship was not preceded by a hearing at which Local 919 could oppose its imposition does not *ipso facto* invalidate the trusteeship. While the Second Circuit has taken a different view, there is authority for the proposition that imposing a trusteeship prior to a hearing is an extraordinary remedy to be employed only in emergency situations. Thus, the District of Columbia Circuit Court of Appeals has held:

> "A trusteeship may be imposed without a hearing only where a parent union could reasonably believe that an emergency situation does not allow time for such a hearing." *Local Union 13140* v. *United Mine Workers*, 475 F.2d 906, 915 (D.C. Cir. 1973).

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other duties of a bargaining representative; restore democratic procedures; or otherwise carry out the legitimate objectives of the International Union, including the enforcement of compliance with Federal, State, or Provincial law, the Constitution or laws of the International Union, the approved bylaws of the chartered body, or the rules, decisions, or orders of the International Executive Board, the International Executive Committee, or of International officers made within the scope of their authority under this Constitution. Whenever in the judgment of the International Executive Committee such action is required, it shall have the power to place such chartered body in temporary trusteeship or take such other temporary action as it deems necessary. If a temporary trusteeship is imposed, the International President shall appoint a trustee, who shall administer the affairs of the chartered body during trusteeship. Within 30 days following the imposition of a temporary trusteeship, a hearing shall commence to determine whether the trusteeship is justified and shall be continued."

A trusteeship is presumed valid if it is imposed pursuant to the parent union's constitution and "authorized or ratified after a fair hearing." 29 U.S.C. § 464(c). Seizing on the distinction between "authorization" and "ratification," the Second Circuit has held that there is no necessity for a fair hearing *prior* to the imposition of trusteeship, as long as a *post hoc* hearing is provided for in the parent's constitution and the hearing follows with reasonable promptness. *National Association of Letter Carriers* v. *Sombrotto, supra,* 449 F.2d at 920. *Sombrotto* contains no indication that a [12] trusteeship without a prior hearing is only justified in emergency situations. In the present case Article 9(k) of the International's constitution expressly permits the imposition of the trusteeship prior to a hearing and provides that a hearing must be convened within thirty days of its imposition. A hearing has been scheduled for July 31, 1979, which is less than thirty days from July 3, the date the trusteeship was imposed.

The Second Circuit has held that the two normal prerequisites for preliminary injunction—namely, a likelihood of success on the merits and possible irreparable injury—are not to be rigidly applied to a case where a parent union is seeking to enforce a trusteeship against one of its resisting locals. *National Association of Letter Carriers* v. *Sombrotto, supra,* 449 F.2d at 920. The standard to be applied in such a case was succintly stated by that court:

> "[T]he parent is entitled to a preliminary injunction imposing a trusteeship on application unless the local comes forward with adequate proof that the trusteeship is not being sought in good faith." *Id.* at 921.

Mindful of Judge Hays' admonition that in this type of case "judicial intervention should be undertaken with only the greatest care and caution," *Executive Board*

Local 1302 v. [13] *United Brotherhood of Carpenters, supra,* 477 F.2d at 615, the Court, upon consideration of all the evidence submitted by both sides, finds that Local 919 has met the onerous burden imposed by *Sombrotto* and has proven that the trusteeship is not being sought in good faith.

The statutory purpose which the UFCW claims is served by the trusteeship is the correction of "corruption or financial malpractice." As evidence of this charge the International points to three claimed irregularities which were uncovered by the audit: (1) double reimbursement of 13 expenditures incurred by Espinosa on behalf of Local 919, (2) the approval of certain expenditures by the Local's Board of Trustees and Executive Board without appropriate supporting documentation, and (3) the failure of Espinosa to submit in proper form an itemized statement of expenditures to the Local's Executive Board. The UFCW cites the termination of the audit, the removal of union records by Espinosa to his home and the transfer of the Local's bank accounts to the Webster 5 Cent Savings Bank as additional indications of corruption or financial malpractice. The Court finds that none of the circumstances in this instance warrant the imposition of a trusteeship; and further finds that the trusteeship was not in fact imposed because of these claimed irregularities. Rather [14] the trusteeship was imposed because of the personal animosity existing between Espinosa and Wynn and because of the latter's desire to seize the opportunity to remove the former as the president of Local 919.

Most of the irregularities uncovered during the audit could have been explained by the officers and employees of Local 919, if an explanation had been sought. The submission of both the soft copy and the hard copy of credit card billing slips was not done with the purpose of extracting double payment by Espinosa; rather the

practice was instituted in order to guard against double payment of bills to the credit card company. Both the bookkeeper, Micha, and the accountant, Kravet, testified that Espinosa had given them repeated instructions to guard against overpayment of charge card expenditures. There is no indication that the International ever disapproved of Local 919's attempt to avoid overpayment of credit charges in this manner. Moreover, the double payment of 13 bills, totaling $562.45 over a three-year period, in the context of more than one thousand credit card charges involving more than $50,000, does not indicate corruption *per se* or financial malpractice. At most, it is evidence of human error or sloppy accounting practice by the bookkeeper, Micha.

The second claimed irregularity was that the Local's [15] Board of Trustees and Executive Board approved expenditures without requiring the appropriate documentation. There was evidence that Espinosa was reimbursed for expenses when he did not produce the original receipt. For instance, on one occasion when he lost his travel ticket, he offered the airline baggage receipt as proof that he in fact boarded the flight. The International charges that such evidence does not provide adequate documentation of the expense. While recognizing that the better practice is to produce the actual receipt for expenses incurred before seeking reimbursement, the Court cannot conclude that where a receipt has been lost or mislaid the person incurring the expense should forego reimbursement, even where other supporting data has been substituted. Nothing in the International's constitution or by-laws leads to this inflexible conclusion and common sense would dictate otherwise.

The third claimed irregularity uncovered by the audit is that Espinosa did not submit a proper itemized statement of expenses to the Local's Executive Board, submitting instead the check ledger. Article 34(B)10 of

the International constitution requires the local president to make an "itemized statement" at each local Executive Board meeting of all income received by and expenditures made by the local president.[3] [16] Espinosa apparently believed that check ledgers constituted appropriate documentation. No provision of the International constitution defines the term "itemized statement;" nor was Espinosa ever informed by the International that his practice was unacceptable. Thus, even if the two accounting procedures complained of were in fact technically faulty, there is no indication that Espinosa employed them knowing of their deficiencies. Moreover, no evidence was introduced which indicated that these practices actually resulted in the payment of expenses which were not properly incurred on behalf of Local 919. Significantly the auditors and Novicoff never asked to pursue the Local's paid bill files, which could have been consulted to check on any expenditures which appeared suspicious or irregular, in spite of the offers of the Local's bookkeeper and certified public accountant to provide them with such assistance. Even Daniel Benson, the Touche Ross and Company auditor who was employed by the plaintiffs themselves to audit the Local's books stated that no adverse inference could be drawn against

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[3] Article 34(B)10 provides:

> "The Local Union President shall make an itemized statement at each regular meeting of the Local Union Executive Board of all moneys received and paid out by the President, the accuracy of which shall be certified by the trustees of the Local Union, and the President shall make the Local Union financial records available to the trustees at their request. The President shall make such itemized statement available for inspection by the members at regular meetings and at the Local Union on a reasonable basis. The President shall also make a financial report at each regular meeting of the membership."

Espinosa on account of the double billing or the inadequacies in the documentation of the Local's expenses. In other words, the information found in the audit was insufficient to indicate corruption or financial malpractice.

[17] Neither the removal of union records by Espinosa to his home nor the transfer of the union bank accounts to the Webster 5 Cent Savings Bank was done for ulterior motives. Certain union files which had been audited were removed temporarily from the Local's office, only after Espinosa had been informed by Dority that the audit had uncovered double billings and that there were very serious irregularities, which required that Espinosa interrupt his planned vacation in California to return home. Faced with these accusations, Espinosa removed these audited files on Sunday, the day he arrived back in Hartford, not for the purpose of destroying or altering them, but in order to review them over the weekend with his accountant, to determine whether there was any factual basis to the oral charges which had been made to him by Dority. Similarly the subsequent transfers of the union bank accounts were affected, upon the advice of legal counsel, not with a view toward looting the union treasury, but rather to safeguard the Local from any potential unlawful takeover by the International. This conclusion is buttressed by the fact that Espinosa did not open the account in the Webster 5 Cent Savings Bank in his own name, but in the name of Local 919. There is no evidence that Espinosa ever destroyed or altered any business records or converted any union [18] assets to his own use, except for the 13 credit card charges hereinbefore mentioned.

The most serious charge made against Espinosa is that he interrupted UFCW's union audit. Article 11(M) of the International's constitution grants it an unqualified right to audit the Local's books at any time without

notice.[4] Therefore, Espinosa's interruption of the audit was a clear violation of the International's constitution and the Court finds such action to be unwarranted. However, he took that action in good faith, believing the audit to be a frame-up or a pretext to oust him from his position as local president and that it was designed as a mechanism for the International to assume control over the Local. Granted that Espinosa's response to the situation was improper, it does not provide sufficient evidence of corruption or financial malpractice. The appropriate reaction to Espinosa's interruption of the audit would have been a notice from Wynn that the International had a right to audit the Local's books, backed up with an appropriate court order if that were necessary.

The Court concludes that the Local has sustained its burden of proving that the imposition of the trusteeship was arbitrary and carried out in bad faith. From the outset, it was Espinosa who was acting in a straightforward manner. Upon [19] being informed of the audit, he readily consented, expressed his cooperation and so instructed the Local's personnel. He interfered only when it became apparent that he had been deceived as to the purpose of the audit. The International, on the other hand, practiced deceit from the beginning, misrepresent-

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[4] "The International Union shall have the authority, without notice, to obtain or make a routine audit, inspection, or examination of all books and records of any chartered body. The International Union is authorized to audit, inspect, or examine any of the books, records or other documents as may be reasonable and necessary to assure that the laws or Code of Ethical Practices established by the International Executive Board are being respected. The International Secretary-Treasurer, in conjunction with the International President, shall exercise the foregoing authority through the appointment of authorized representatives or through the employment of necessary personnel."

ing to Espinosa the true purpose of the audit. The entire factual background indicated that UFCW was using the audit as a pretext to remove Espinosa and take over the Local, because of the personal difficulties which had arisen between him and Wynn. A fair, reasonable and expeditious way of proceeding when faced with Espinosa's interruption of the audit would have been for Wynn to grant the interview Espinosa sought and then to inform him of the necessity of submitting to the audit. The fact that Wynn immediately imposed the trusteeship rather than pursuing this course, along with the other evidence, leads the Court to the conclusion that the International was not sincerely interested in auditing Local 919's books; its purpose was the removal of Espinosa.

This plan, if it had been successful, would have had a devastating impact on the autonomy of Local 919. The UFCW was attempting to oust all of the Local's officers and to replace them with Wynn's nominees. This drastic action was to be taken without a hearing, and after the July 31 hearing the trusteeship would enjoy an eighteen months presumption of validity. 29 U.S.C. § 464(c).

[20] Having found that there were insufficient grounds for imposing the trusteeship and that it was imposed in bad faith and for an improper purpose, the Court denies the UFCW's motion for a preliminary injunction. The Court also grants the Local's motion for a preliminary injunction enjoining the maintenance of the trusteeship or otherwise interfering with the functions of the Local on the basis of the present record. This does not mean, however, that the International may not impose a trusteeship at a later date if it develops credible facts to support such a move. To that end Local 919 is directed to allow the International to audit its books, without any limitation as to the scope of the audit or the time period covered and without any interference. The

audit shall be conducted in the Local's office, the same quarters in which the audit was begun. Furthermore, the defendant Espinosa is ordered to withdraw the union funds from the out of state bank or banks and redeposit the same into the banks where the monies previously had been deposited. Due return shall forthwith be made to the Court that this has been done. The parties shall agree upon and submit an appropriate order within five (5) days.

The foregoing opinion shall constitute the findings of fact and conclusions of law required by Fed. R. Civ. P. 52(a).

SO ORDERED.

Dated at Hartford, Connecticut, this 23rd day of July, 1979.

/s/ T. Emmet Clarie
T. EMMET CLARIE
Chief Judge

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Civil No. H79-384

[Filed July 31, 1979—4:42 P.M.]

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, *et al.*

—vs.—

RETAIL STORE EMPLOYEES UNION, LOCAL NO. 919, *et al.*

ORDER

Upon the findings of fact and conclusions of law entered herein on July 23, 1979, it is hereby ORDERED, ADJUDGED, AND DECREED that:

1. Plaintiffs', United Food and Commercial Workers International Union and its officers, request for a preliminary injunction restraining the officers and employees of Local 919 from interfering with the temporary trusteeship imposed by UFCW over Local 919 on July 3, 1979, is denied.

2. Defendants', Retail Store Employees Union, Local No. 919 and its officers, request for a preliminary injunction against the UFCW and its officers implementing at this time the trusteeship of Local 919 is granted.

3. Plaintiffs, their officers, agents, employees and attorney, and all persons acting in active concert or participation with them, are enjoined from in any manner attempting to enforce the July 3, 1979, trusteeship against defendant Local 919, the individual defendants, their officers, agents or employees and are ordered immediately to remove all restraints they and any of them have imposed or caused to be imposed upon any and all

of defendant Local's bank accounts, funds, assets or properties pursuant to said trusteeship, and they shall not attempt to reimpose such restaints on the basis of the record as of July 3, 1979.

4. Defendants, Local 919, Espinosa, Magnant, Looke, Pisani, Languell, Ravosa, Gagnon, Kroopneck, and Soucy, shall return all funds which were temporarily removed from bank accounts in the Hartford area back to their original depositories.

5. Defendants, Local 919, Espinosa, Magnant, Looke, Pisani, Languell, Ravosa, Gagnon, Kroopneck, and Soucy, shall permit the UFCW to proceed with its audit of the Local's books and records, as provided in the UFCW Constitution, and shall do all acts appropriate to permit an uninterrupted and thorough audit by the UFCW of Local 919, including, but not limited to, the following:

(a) making available to the auditors all books or records of Local 919;

(b) instructing Local 919's accountant and bookkeeper to make themselves available to the auditors to answer questions and furnish information which the auditors may request;

(c) cooperating, and instructing those under their direction and control to cooperate with requests of the auditors for information, books, or records;

(d) providing the auditors with information and assistance necessary for them to determine the location and nature of all books and records.

SO ORDERED.

Dated at Hartford, Connecticut, this 31st day of July, 1979.

/s/ T. Emmet Clarie
T. EMMET CLARIE
Chief Judge

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

[Filed Nov. 26, 1979]

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 26th day of November, one thousand nine hundred and seventy-nine.

Present: Hon. William H. Mulligan
Hon. Thomas J. Meskill
Hon. Amalya L. Kearse
Circuit Judges.

79-7509
79-7597

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION; WILLIAM H. WYNN, *et al.*,
Plaintiffs-Appellees,

—against—

RETAIL STORE EMPLOYEES UNION, LOCAL NO. 919; ARNALDO F. ESPINOSA, *et al.*,
Defendants-Counterclaimants-Appellants.

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

We find no abuse of discretion in Chief Judge Clarie's order requiring Local 919 to submit to an audit pur-

suant to Article 11M of the International Constitution. The argument that an audit constitutes a trusteeship as defined in 29 U.S.C. § 402(h) is not persuasive. We therefore affirm the order of the District Court dated July 23, 1979.

/s/ William H. Mulligan
WILLIAM H. MULLIGAN

/s/ Thomas J. Meskill
THOMAS J. MESKILL

/s/ Amalya L. Kearse
AMALYA L. KEARSE

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

[Filed Jan. 23, 1980]

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 23rd day of January, one thousand nine hundred and eighty.

Present: HON. WILLIAM H. MULLIGAN,
HON. THOMAS J. MESKILL
HON. AMALYA L. KEARSE,
Circuit Judges.

79-7509
79-7597

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, WILLIAM H. WYNN, SAMUEL J. TALARICO, HARRY R. POOLE, THOMAS G. WAHLEY, JAY H. FOREMAN and DOUGLAS H. DORITY,

Plaintiffs-Appellees,

v.

RETAIL STORE EMPLOYEES UNION LOCAL NO. 919, ARNALDO F. ESPINOSA, BERNARD MAGNANT, JAMES LOOKE, RENE PISANI, VIOLET LANGUELL, ESTNER RAVOSA, JOSEPH GAGNON, ALFRED KROOPNECK and GORDON SOUCY,

Defendants-Appellants.

A petition for a rehearing having been filed herein by counsel for the defendants-appellants

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ A. Daniel Fusaro
A. DANIEL FUSARO
Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

[Filed Jan. 23, 1980]

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-third day of January, one thousand nine hundred and eighty.

79-7509
79-7597

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, WILLIAM H. WYNN, SAMUEL J. TALARICO, HARRY R. POOLE, THOMAS G. WAHLEY, JAY H. FOREMAN and DOUGLAS H. DORITY,

Plaintiffs-Appellees

v.

RETAIL STORE EMPLOYEES UNION LOCAL NO. 919, ARNALDO F. ESPINOSA, BERNARD MAGNANT, JAMES LOOKE, RENE PISANI, VIOLET LANGUELL, ESTNER RAVOSA, JOSEPH GAGNON, ALFRED KROOPNECK and GORDON SOUCY,

Defendants-Appellants

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendants-counterclaimants-appellants, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ Irving R. Kaufman
IRVING R. KAUFMAN
Chief Judge

Supreme Court, U. S.
FILED
JUL 18 1980
MICHAEL RODAK, JR., CLERK

No. 79-1848

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

RETAIL STORE EMPLOYEES UNION, LOCAL NO. 919; ARNALDO F. ESPINOSA, et al.,
Petitioners,

v.

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION; WILLIAM H. WYNN, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF IN OPPOSITION

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Counsel for Respondents

July 18, 1980

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Did the District Court abuse its discretion by granting a preliminary injunction ordering Local 919, a "chartered body" or local union of the United Food and Commercial Workers International Union (UFCW), to submit to the UFCW's audit of all its books and records pursuant to Article 11(M) of the UFCW Constitution, which provides, in pertinent part, that: "The International Union shall have the authority, without notice, to obtain or make a routine audit, inspection, or examination of all books and records of any chartered body"?

PARTIES TO THE PROCEEDING IN DISTRICT COURT

All parties to the proceeding in District Court are: United Food and Commercial Workers International Union, William H. Wynn, Samuel J. Talarico, Harry R. Poole, Thomas G. Whaley, Jay H. Foreman and Douglas H. Dority, Plaintiffs; and Retail Store Employees Union, Local No. 919, Arnaldo F. Espinosa, Bernard Magnant, James Looke, Rene Pisani, Violet Languell, Ester Ravosa, Joseph Gagnon, Alfred Kroopneck and Gordon Soucy, Defendants.

TABLE OF CONTENTS

	Page
OPINION BELOW	1
COUNTERSTATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	
I. THE COURT BELOW CORRECTLY CONCLUDED THAT THE UFCW AUDIT OF LOCAL 919 IS NOT AN LMRDA SECTION 3(h) TRUSTEESHIP, AND THAT THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ORDERING LOCAL 919 TO SUBMIT TO AUDIT	6
II. THE DECISION BELOW DOES NOT CONFLICT IN PRINCIPLE WITH DECISIONS OF OTHER CIRCUITS AND WITH FUNDAMENTAL TEACHINGS OF THIS COURT	11
III. THE DISTRICT COURT AND THE COURT OF APPEALS PROPERLY DETERMINED THAT THE CONDUCT OF AN AUDIT DOES NOT CONSTITUTE A SUSPENSION OF AUTONOMY REGULATED BY THE LMRDA	15
IV. THERE WAS NO DISREGARD OF THIS COURT'S TEACHINGS BY THE DISTRICT COURT OR COURT OF APPEALS AND THEREFORE THERE IS NO NEED FOR THE EXERCISE OF THE SUPERVISORY POWER OF THIS COURT	16
CONCLUSION	17
APPENDIX	1a

TABLE OF AUTHORITIES

Cases: Page

Grand Lodge of International Association of Machinists v. *King*, 335 F.2d 340 (9th Cir., 1964), *cert. denied*, 379 U.S. 920 14

Labor Board v. *Erie Resistor Corp.*, 373 U.S. 221 (1963) 13

Local Union 13410, United Mine Workers v. *United Mine Workers*, 475 F.2d 906 (D.C. Cir., 1973) .. 17

Machinists Local v. *Labor Board*, 362 U.S. 411 (1960) 13

Mt. Healthy City Board of Education v. *Doyle*, 429 U.S. 274 (1977) 8

Parks v. *International Brotherhood of Electrical Workers*, 314 F.2d 886 (2d Cir., 1963), *cert. denied*, 372 U.S. 976 12

Turner v. *Air Transport Lodge 1894, Etc.*, 590 F.2d 409 (2d Cir., 1978), *cert. denied*, 442 U.S. 919 16

Vestal v. *Teamsters*, (unreported), 81 LRRM 2732 (D.C. Cir., 1972) 11

Vestal v. *Teamsters*, (unreported), 77 LRRM 2997 11

Statutes:

Labor Management Reporting and Disclosure Act of 1959, as amended

Section 3(h), 29 U.S.C.A. § 402(h) ...6, 9, 11, 12, 15

Section 201, 29 U.S.C.A. § 431 13

Section 302, 29 U.S.C.A. § 462 .....9, 12, 15

Section 304(a)(c), 29 U.S.C.A. § 464(a)(c) .. 9, 12, 15

Section 501(a)(c), 29 U.S.C.A. § 501(a)(c) .. 8, 10, 12

Section 609, 29 U.S.C.A. § 529 14

Miscellaneous:

Black's Law Dictionary (Fourth Ed., 1961) 9

Webster's *Third New International Dictionary* (unabridged, 1965) 9

No. 79-1848

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

RETAIL STORE EMPLOYEES UNION,
LOCAL NO. 919; ARNALDO F. ESPINOSA, et al.,
Petitioners,

v.

UNITED FOOD AND COMMERCIAL WORKERS
INTERNATIONAL UNION; WILLIAM H. WYNN, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF IN OPPOSITION

Respondents, United Food and Commercial Workers International Union, *et al.*, oppose the petition for a writ of *certiorari* for the reasons presented below.

OPINION BELOW

In an unpublished, five sentence decision, 614 F.2d 1291, the Court of Appeals unanimously affirmed the District Court's preliminary injunction directing Petitioner to submit to audit pursuant to Article 11(M) of the International Constitution.

COUNTERSTATEMENT OF THE CASE

The audit of Local 919's books and records which the local union and its officers and executive committee seek to block was requested by Douglas H. Dority, Director of the Northeastern Region of the United Food and Commercial Workers International Union. Dority, whose normal duties include reviewing reports submitted by the trustees of Local 919, observed that Local 919 had unusually high expenditures for printing, promotional items, and liquor. Dority had also been informed that Local 919's president, Arnaldo F. Espinosa, had charged expenses for himself and female companions on his credit cards for which he had been reimbursed by Local 919 (6a; App. II, pp. 140-142).* Thereafter, Dority engaged auditors from Touche Ross & Company to examine Local 919's records in the suspect areas, including the expense account practices of Espinosa (6a-7a; App. II, pp. 11-12).

Touche Ross & Company audited Local 919's books and records for only three days, from July 26 to July 29, 1979, before Local 919 President Espinosa blocked further progress of the audit by hiring police officers to bar any but Local 919 personnel from its offices. He also took to his home the records of Local 919 which the Touche Ross auditors had been examining and photocopying (6a-8a). Even in the limited time available to them, the auditors had found almost immediately that in 13 instances involving $572, Espinosa had double billed the Local by submitting for reimbursement both the customer copy of

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* Citations appearing in this Brief are to the page numbers of the documents for which the following abbreviations are used:

a— Appendix attached to the Petition for Writ of Certiorari

JA— Joint Appendix in the Court of Appeals

App. II— Second Appendix in the Court of Appeals

Pet.— Petition for Writ of Certiorari

an expense and the copy enclosed in the monthly billing statement. The auditors also found that Espinosa had been reimbursed for a significant number of expenses without having submitted anything to show that the expenses were for union business (14a-15a; App. II, p. 51ff.).

The obstruction of the audit and the evidence of financial malpractice developed by the auditors gave rise to numerous potential violations of the UFCW Constitution. The Constitution provides that all local unions are required to abide by and conform with all provisions of the Constitution and laws of the International Union (JA 240, Article 32(C)). Local unions are required to expend union assets solely for union business (JA 242, Article 37(A)). Local union trustees are required to ensure that local union funds are properly accounted for, and expended only on proper authorization (JA 242, Article 36(B)); and local union officers are required to keep the local union's books and records in good order and to have them available at all times for authorized audit, examination or inspection (JA 241, Article 34 (G)(1)). The International Union is authorized to examine all or any of the local union's books and records, and to do so either directly with its own employees or through the employment of necessary personnel. That authority is set forth in Article 11(M) of the Constitution, which provides, in part, as follows:

> The International Union shall have the authority, without notice, to obtain or make a routine audit, inspection, or examination of all books and records of any chartered body. . . .

On July 3, 1979, the five member UFCW Executive Committee authorized a temporary trusteeship over Local 919, pending a hearing within 30 days to determine whether the trusteeship was justified and should continue. In authorizing the temporary trusteeship, the

Executive Committee pointed out that the International Constitution had been violated by the obstruction of the audit, by double reimbursement of single expenses, and by the expenditures that were made without documentation showing their union business purpose (9a-10a; JA 25-26, 219-220). The Executive Committee appointed Dority as Trustee of the Local, and specifically directed him to complete the interrupted audit (10a; JA 220-221).

While the District Court found that the UFCW did not have valid grounds for a trusteeship, it never intimated that the facts developed in the obstructed audit were trivial or did not warrant further investigation. Quite to the contrary. The Court devoted considerable space to discussing whether "the irregularities uncovered during the audit could have been explained by the officers and employees of Local 919" (14a). As regards Espinosa's double billing of Local 919, the Court made the remarkable suggestion that it had occurred because Espinosa had attempted to avoid double billing by submitting both the soft and hard copy of expenses (14a-15a). As regards the failure to maintain documentation of the union business purpose of expenditures, the Court observed that "the better practice" is to retain such documentation but that reimbursement without it was justifiable if the requisite documentation had been lost (15a). Only after it was satisfied that an explanation could exist for these irregularities did the Court conclude that they were insufficient to warrant imposition of a trusteeship.

Since the audit had proceeded for only three days at the time of the Court's Ruling on Cross Motions for Preliminary Injunction, it was obviously possible that the completion of the audit might develop facts which would cast a substantially different light on the apparent irregularities revealed in the audit's preliminary stages.

Those facts might have completely exonerated Espinosa and Local 919, or might have had a contrary result. The Court therefore enjoined imposition of the temporary trusteeship, but directed Local 919 to submit to a thorough audit of its books and records as required by Article 11(M) of the UFCW Constitution (19a-20a, 22a). It specifically held that even though the audit may have been directed at discovering evidence of wrongdoing by Espinosa, Espinosa's interruption of it had been "unwarranted" (18a).

After unsuccessfully seeking a stay of the District Court's order both from the Appellate Court and this Court, Petitioners permitted the audit to continue. The auditor gave the UFCW an interim report on January 30, 1980, and the UFCW provided Petitioners with a copy to enable them to explain or clarify any of the auditor's tentative findings. Much of the report focused on Espinosa's having obtained tens of thousands of dollars from Local 919 in payment to his credit card accounts for items of hotel, travel and restaurant expenses as to which there was no evidence of any union business purpose. In reply to the auditors' interim report, Espinosa filed an affidavit admitting that he could not recall any union business purpose for many of the items noted by the auditor. Petitioners seriously misrepresented the significance of the report in asserting that it "revealed that UFCW had been unable to substantiate any of the grounds for suspicion Dority originally advanced to justify the audit . . ." (Pet. 11, n.9). A principal reason for Dority's initiating the audit was the reports he had received that Espinosa had diverted union assets to pay personal entertainment expenses for himself and female companions. The auditor's determination that there were many items of hotel, restaurant and travel expenses which bore no evidence of any relation to union business certainly substantiates Dority's concern. It should also be noted that the auditor is still

investigating Espinosa's credit card practices, and that the District Court has ordered his credit card companies to produce documentation in their possession relating to the items questioned by the auditor.

REASONS FOR DENYING THE WRIT

I. THE COURT BELOW CORRECTLY CONCLUDED THAT THE UFCW AUDIT OF LOCAL 919 IS NOT AN LMRDA SECTION 3(h) TRUSTEESHIP, AND THAT THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ORDERING LOCAL 919 TO SUBMIT TO AUDIT

The only issue decided by the Appellate Court was that the District Court did not abuse its discretion in granting a preliminary injunction directing Local 919 to submit to audit as provided by Article 11(M) of the UFCW Constitution. This limited, particularized determination does not present an issue meriting review by this Court. Even if it did, however, the issue was correctly decided and thus there is no reason for this Court to grant review.

The fact that the District Court properly exercised its discretion in directing Local 919 to submit to audit was sufficiently apparent to the Appellate Court that it did not give the matter any extended discussion. Numerous factors clearly established the propriety of the District Court's decision. First, the information received by Dority regarding the possibility that Espinosa was diverting union assets to the payment of entertainment expenses charged on his personal credit cards created a substantial, independent and entirely valid basis for an audit. Second, the audit was conducted by a reputable certified public accounting firm which at all times conducted itself in a proper manner. Indeed, Judge Clarie relied on the testimony of one of the auditors in reaching his decision (16a-17a). Third, the audit immediately disclosed that

in numerous instances involving thousands of dollars, Espinosa had caused Local 919 to issue checks to his credit card companies for restaurant, hotel and travel expenses charged on his personal credit cards and had done so without submitting any evidence that the expenses in question were union business expenses. Espinosa's practices in this regard are still being investigated by the auditors. Finally, since the audit has at all times been conducted under the general supervision of the District Court and the District Court has retained jurisdiction to review the outcome of the audit and any action by the UFCW based on the audit, there is no possibility that the results of the audit could be used as a mere pretext to reimpose a trusteeship on Local 919. The District Court expressly held that it would permit a trusteeship to be imposed only upon "credible facts to support such a move" (19a). Thus, there is simply no reason why Local 919 should not submit to full audit. Indeed, one would think that Local 919 would wish such an audit if only to remove any doubts over its finances raised by Espinosa's double billings and the lack of adequate documentation for Local Union expenditures.

It is apparent from the above factors that the District Court did not require Local 919 to submit to a baseless audit with pretextual objectives, but rather to an independent, judicially supervised audit for the critically important objective of determining whether Local 919's assets had been properly applied by its officers. Petitioners' assertion that the District and Appellate Courts rejected application of this Court's illegal motive teachings to the audit is baseless, since neither court sanctioned an illegally motivated audit.

Petitioners' contention is also erroneous because this Court has not created a federal common law of illegal motivation which was susceptible of application to the audit. To the extent that this Court has dealt with cases of

illegal motivation in other contexts, it has never taken the position that the existence of a partially tainted motive renders actions unlawful that would have been taken absent the tainted motive. On the contrary, the Court has held, for example, that even where retaliation against constitutionally protected conduct is a motivating factor in a school district's discharge of a teacher, the discharge may be upheld where such actions would have been taken absent the improper motivation. *Mt. Healthy City Board of Education* v. *Doyle*, 429 U.S. 274, 287 (1977). In *Mt. Healthy*, the Court cited as analogous support a number of criminal cases in which the admissibility of confessions had been upheld once the effect of earlier unlawful actions giving rise to the confessions had been dissipated. *Mt. Healthy*, 429 U.S. at 286-287.

Here, the District Court could have justifiably concluded that the information possessed by Dority was a sufficient, independent basis for audit of Local 919 and that an audit would have been conducted regardless of the existence of hostility between Espinosa and any international union officer. Petitioners contend, without foundation, that the UFCW would not have undertaken an audit "on such slight grounds," (Pet. 7), completely disregarding the gravity of information Dority received. That information suggested the possibility of misappropriation of union assets by local union personnel in violation of 29 U.S.C. § 501(c), a federal felony, or, at a minimum, a breach of fiduciary responsibility by local union officers contrary to 29 U.S.C. § 501(a) as well as significant violations of the UFCW Constitution. These are hardly "slight grounds" for an audit.

Petitioners recognize that their "illegal motive" argument must fail unless they can establish the existence of a federal statute which requires a pristine motive for an audit. The statute they principally rely on to establish the requirement for such a motive is The Labor Management Reporting and Disclosure Act of 1959, as amended

(LMRDA), Sections 3(h), 302 and 304(a) and (c), which define "trusteeship" and establish the conditions under which a trusteeship may be imposed. In essence, Petitioners contend that while a legally motivated audit does not meet the definition of trusteeship in Section 3(h) and thus is not subject to the limitations of Section 302, an illegally motivated audit is a trusteeship and thus is subject to the limitations of Section 302. This contention must fail, not only because it is absurd on its face but because the definition of trusteeship in Section 3(h) will not support the gloss which Petitioners would give it.

An audit, however motivated, is simply not a method of supervision or control which suspends the autonomy otherwise available to a UFCW local union under the UFCW Constitution, and thus does not meet the definition of "trusteeship". Petitioners' argument that an audit is a method of supervision or control relies on what they claim is a literal, dictionary definition of these terms (Pet. 16, n. 10). Their use of the dictionary is not honest, to say the least. For example, they cite Webster's *Third New International Dictionary* (unabridged, 1965) as defining "control" as "verification, scrutiny." It would follow then, that an audit, which involves verification and scrutiny of records, is literally a form of control. However, the words "verification, scrutiny" appear nowhere in Webster's definition of control. They are used to explain the etymology of "control," which is derived from the Middle French word "contrerolle" meaning, *inter alia*, "verification, scrutiny." Petitioners' attempts to use *Black's Law Dictionary* to support their position is equally weak.

Besides the fact that an audit is not a method of supervision or control, the UFCW audit of Local 919 could not meet the LMRDA Section 3(h) definition of trusteeship because it does not suspend the autonomy otherwise available to Local 919. Under the UFCW Constitution, local unions are not entitled to freedom from

audit. On the contrary, they are required to submit to audit pursuant to Article 11(M). Moreover, the audit of Local 919 has not diminished in the least the Local's control over its own internal affairs. The audit has not removed Local 919's officers from their positions or interfered with the conduct of Local Union meetings or administration. Moreover, Local 919's freedom and self direction is thoroughly protected by the July 23 and 31 Orders of Judge Clarie directing the removal of the temporary trusteeship and of all restraints against Local 919's funds, assets, or properties. Pursuant to those Orders, Local 919 is operating just as it did before the trusteeship, with its own officers and staff, under its own bylaws and in complete control of its own funds, assets and property.

Petitioners' invitation to this Court to construe the LMRDA to preclude improperly motivated audits of local unions by their parent internationals has a transparent objective: to create a doctrine which would permit local union officers to use parent union *animus* as a shield against parent union discovery of the officers' wrongdoing. Such a result would be at odds with the fundamental objective of the LMRDA to ensure that officers of a union "hold its money and property solely for the benefit of the organization and its members . . . ." Section 501(a). Petitioners make the bogus claim that permitting hostile audits to discover financial malpractice would be "to make the end justify the means" (Pet. 19). This is obviously not so. An audit itself is an entirely harmless procedure which does no violence to a local union's independence. Improper efforts to use the results of an audit unfairly can be remedied by resort to federal courts. There can thus be no danger in a local union submitting to an audit, but tremendous risk to a local union's assets and members in permitting a local union to block an audit by challenging its motivation. Thus, both as a matter of statutory construction and from the

viewpoint of federal labor policy, there is no basis for granting *certiorari.*

II. THE DECISION BELOW DOES NOT CONFLICT IN PRINCIPLE WITH DECISIONS OF OTHER CIRCUITS AND WITH FUNDAMENTAL TEACHINGS OF THIS COURT

Petitioners' second reason for arguing that *certiorari* should be granted is based, not on Section 3(h) of the LMRDA, but supposedly on a conflict between the Appellate Court's decision and the decisions of other circuits and the fundamental teachings of this Court. We will show there is no such conflict.

Before considering Petitioners' argument, there is one preliminary matter that must be treated. Petitioners would have this Court believe that the spirit of the LMRDA is violated by a "discriminatory, unlawfully motivated audit" even where the union constitution unqualifiedly authorized audits. For this proposition, they rely on sheer *ipse dixit.* The notion that the "spirit" of the LMRDA may be invoked to invalidate union constitution provisions was clearly rejected in *Vestal* v. *Teamsters* (unreported), 81 LRRM 2732 (D.C. Cir., 1972) (attached as Appendix) where the appellate court overturned a lower court decision (unreported), 77 LRRM 2997 (attached as Appendix), setting aside amendment provisions of an international constitution on the basis that they violated the spirit of the LMRDA but not necessarily its language. The appellate court simply concluded that there was no basis in the LMRDA for such an order. While Petitioners rely on several constitutional law and National Labor Relations Board cases for the proposition that certain discriminatory, unlawfully motivated conduct by way of state action or employer activity establishes violations of the U.S. Constitution or the National Labor Relations Act, those cases are totally inapposite here since there is neither a constitutional nor a statutory restriction on the motives underlying an

audit of local unions by their parent internationals. A review of the provisions of Article 11(M) of the International Constitution makes it clear that motive is irrelevant to the conduct of an audit which is specifically authorized by that Article.

In light of the foregoing we will now respond to Petitioners' argument that the decision below conflicts with decisions of other circuits and of this Court. Petitioners' initial thrust is that basically, even if an audit is considered too small an invasion to be considered a suspension of autonomy for the purpose of Section 3(h), discriminatory, illegally motivated audits would still be condemned by the policy of Sections 302, 304(c), 501 and 609 of the LMRDA. Petitioners rely upon *Parks* v. *International Brotherhood of Electrical Workers*, 314 F.2d 886 (2d Cir., 1963), wherein the Second Circuit concluded that the revocation of a charter of a local union was not a trusteeship. There the Supreme Court denied *certiorari* at 372 U.S. 976. Certainly, if *certiorari* was denied in *Parks*, it seems unlikely that *certiorari* should be granted under a theory that even where the audit does not constitute a trusteeship because it is too small an invasion to constitute a suspension of autonomy, it should still be condemned because it was illegally motivated and discriminatory. The *Parks* case even indicates that illegal motivation will not adversely affect the action of the international union where there are other valid and legitimate reasons for the action taken. In that case, the court held that even though the international president may have been motivated in part improperly because of earlier suits challenging the international's authority, that is not significant in view of the array of other valid and legitimate reasons for revocation (314 F.2d at 904-905). Thus, in the instant case, even if it was concluded that the audit was illegally motivated, since there were valid and legitimate reasons for the conduct of an audit, i.e., double billings and a considerable lack of documentation

in the Local Union's records, then certainly the contractual right to audit should not be denied and the lower court was well within its discretion in ordering the Local Union to submit to audit.

Petitioners next argue that cases arising under the National Labor Relations Act such as *Labor Board* v. *Erie Resistor Corp.*, 373 U.S. 221 (1963), and *Machinists Local* v. *Labor Board*, 362 U.S. 411 (1960), hold that normally innocent or ambiguous actions may be converted into unfair labor practices by the showing of subjective intent to discriminate against employees for engaging in protected rights. Those cases, of course, are easily distinguishable from the instant case. Thus, here, there is no evidence of subjective intent to discriminate in the conduct of the audit, but even more significantly, Petitioners have no right created by a law which is being violated. The right to remain free from audit cannot be found in any statute.

Even an attempt by the Petitioners to show that various sections of the LMRDA have been interpreted liberally by various courts must fail since there is nothing even approaching a finding that an audit is prohibited by any section of the LMRDA.

Petitioners further argue that Internal Revenue Service audits cannot be conducted in bad faith and therefore courts must prevent such conduct on the part of union officials, "against whose potential abuses of power Congress found it necessary especially to legislate." (Pet. 20). What Petitioners failed to state is that Congress specifically legislated against potential abuses by union officials and did not feel it necessary to prevent audits. In fact, audits are part of the machinery of Title II of the LMRDA to protect the assets of the membership. 29 U.S.C.A. § 431.

Contrary to the contentions of Petitioners, there is absolutely no support for their implication that there is

some expression by Congress that local unions should be free from audits and that such congressional preference should override judicial orders designed to maximize the potential exposure of corruption or financial malpractice. Congress has not indicated any opposition to audits, but certainly has spoken on the necessity to correct corruption and financial malpractice, especially where, as here, there is evidence of financial irregularities. It must be noted that Petitioners' attempt to label the audit by the International Union here as a violation of Section 609, 29 U.S.C. § 529, as a reprisal against protected resistance to interference with Local Union autonomy must fail. Clearly, Section 609 "is not a source of additional independent rights, but is an enforcement provision, designed, . . . to effectuate rights conferred in other sections of the Act . . . ." *Grand Lodge of International Association of Machinists* v. *King*, 335 F.2d 340 (9th Cir., 1964), *cert. denied*, 379 U.S. 920. Since there is no right conferred in another section of the Act, Section 609 is not applicable here.

Finally, Petitioners attempt to compare apples with oranges in comparing National Labor Relations Board cases to this case. Petitioners assert that "just as discriminatory or illegally motivated 'surveillance [or interrogation] becomes illegal because it indicates an employer's opposition to unionization' . . . so does discriminatory or illegally motivated audit become illegal because it indicates the parent body's opposition to local autonomy" (Pet. 21). That analogy, of course, is obviously faulty in that unionization or the right to organize is guaranteed as a right to employees under Section 7 of the National Labor Relations Act. On the other hand, the right to be free from audit, as shown above, is not guaranteed by any provision of law.

It is respectfully submitted that *certiorari* should not be granted on the basis of this argument.

III. THE DISTRICT COURT AND THE COURT OF APPEALS PROPERLY DETERMINED THAT THE CONDUCT OF AN AUDIT DOES NOT CONSTITUTE A SUSPENSION OF AUTONOMY REGULATED BY THE LMRDA

Petitioners' third basis for stating that *certiorari* should be granted is that it should be granted to implement the balance Congress struck between protection of local autonomy by law and avoidance of undue interference in internal union affairs. Petitioners state that it is important for the Supreme Court to consider the balance of these issues at the present time because the decision below "chills the freedom of officers of all autonomous subordinate bodies in the labor movement to exercise independence in their conduct of purely local business" (Pet. 22). They state further that unless such abusive audits are condemned by the Court, local officers will be cowed into submission by the possibility of an audit. Of course, as pointed out above, there is no indication that the audit herein is in any way abusive. In fact, the LMRDA contemplates certain restrictions on the autonomy of local unions as is clear from Section 3(h). All the LMRDA prohibits in Sections 302 and 304 is the suspension of autonomy "otherwise available" to a subordinate body except if instituted for the reasons spelled out in Section 302 and in accordance with the constitution and bylaws of the parent union. Thus, as long as the audit does not suspend autonomy otherwise available to the local union in the constitution of the organization, the LMRDA does not even come into play. Of course, in the instant case, the International Constitution provides for the audit which is being conducted and thus, freedom from audit is not something to which a local union is entitled under the International Constitution. Clearly then, there is no need for this Court in the instant case to consider the balance that Congress struck between protection of local autonomy and preservation of labor

organizations' power to control their internal affairs. There is no loss of local autonomy here and, in any event, the system is working just as contemplated in the Labor Management Reporting and Disclosure Act.

This reason put forward for granting *certiorari* should also be rejected as raising a question that is not before this Court. Petitioners' imply that the question before the Court is whether an audit provision of an international constitution can lawfully be construed as authorizing "discriminatory, illegally motivated audits." As pointed out above in detail, there is no evidence of there being a discriminatory, illegally motivated audit in this case and thus, that cannot be the question before this Court.

IV. THERE WAS NO DISREGARD OF THIS COURT'S TEACHINGS BY THE DISTRICT COURT OR COURT OF APPEALS AND THEREFORE THERE IS NO NEED FOR THE EXERCISE OF THE SUPERVISORY POWER OF THIS COURT

Petitioners' fourth reason for the granting of *certiorari* is that "*Sub silentio* rejection of fundamental teachings of this Court by the courts below calls for exercise of this Court's power of supervision" (Pet. 23). Significantly, in that entire section of Petitioners' brief, there is not one Supreme Court case cited. Thus, it is difficult for us to determine what fundamental teachings of this Court Petitioners are concerned about.

Petitioners state that the underlying legal question here is whether authorization under a union constitution immunizes conduct which the LMRDA in terms and policy condemns. As shown above, the conduct here, i.e., the auditing of Local 919, is not condemned by the terms and policy of the LMRDA. Thus, Petitioner's citation of Second Circuit decisions such as *Turner* v. *Air Transport Lodge 1894, Etc.*, 590 F.2d 409, 411 (2d Cir., 1978), *cert. denied*, 442 U.S. 919, for the proposition that a

union constitutional provision cannot legalize what the plain words of the LMRDA forbid has no applicability here. Likewise inapplicable is the proposition stated in *Local Union 13410, United Mine Workers* v. *United Mine Workers*, 475 F.2d 906, 914 (D.C. Cir., 1973), that "this Court will not frustrate the clear intent of Congress by making the remedies available to the local less effective than they were before Congress acted." Petitioners have cited nothing to show that local unions were not subject to the provisions of international constitutions providing for audits prior to the passage of the LMRDA. Certainly, the LMRDA did not change the relationship between an international union and its locals with respect to the subject of auditing.

Thus, it is respectfully submitted that the District Court did not err in directing the Local Union to submit to the audit.

CONCLUSION

It is respectfully submitted that Petitioners have not stated sufficient or persuasive grounds for the granting of their petition in this matter and, thus, *certiorari* should be denied.

Respectfully submitted,

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July 18, 1980

APPENDIX

U. S. DISTRICT COURT
DISTRICT OF COLUMBIA

No. 1237-71

VESTAL, *et al.*

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *et al.*

June 29, 1971

LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT

—Rules for amendment of international's constitution —Violation of Act § 5.15

Although it is arguable whether present rules for amendment of international union's constitution, which do not provide for submission of amendments to rank-and-file members, violate language of LMRDA, it is less arguable that they violate spirit of Act in that membership is not afforded full opportunity to participate in affairs of international. Therefore, international's convention is ordered to institute procedures permitting members to petition for changes and providing for prompt notification of entire membership and referendum.

Action for injunction by seven members of international union against international and officer of international. Ruling in accordance with opinion.

Full Text of Oral Opinion

GREEN, District Judge:—This is a suit seeking an injunction, brought by Don Vestal, President of Local Union 327, of Teamsters, Chauffeurs, Helpers, and Taxicab Drivers, in Nashville, Tennessee, candidate for President of the International Brotherhood, and by six other members of the International.

The defendants are the International Brotherhood of Teamsters, etc., and Frank E. Fitzsimmons, individually, and as General Vice President of International.

[ALLEGATIONS MADE]

Numerous allegations are made by plaintiffs dealing with Defendant Fitzsimmons, then General Vice President's alleged usurpation of authority and power of the General President.

Since the filing of this action General President Hoffa resigned and Fitzsimmons acceded to the General Presidency. Thereafter, he ratified his previous acts while General Vice President.

For the foregoing reasons much of the plaintiffs' complaint is now moot.

Plaintiffs question the constitutionality of Article III, Section 2, with regard to the basis of representation of the Locals by delegates and appointment of Credentials Committee, etc.

This Court finds that these questions are questions of internal organization of the Union and are not so clearly wrong as to warrant intervention by this Court.

Plaintiffs further question the validity of the present rules for amendment of the Constitution. Present rules

provide for submission to a Constitution Committee which may or may not take action thereon. If it does act, a simple majority of the delegates present may adopt this change which becomes effective immediately.

There is no provision for submission to the rank and file of the members of the Union.

Labor unions have become major forces in modern society. As such they should zealously guard and preserve the institutions of that society, one of which is the democratic process.

It may be arguable whether the provisions of the Constitution violate the *language* of the Landrum-Griffin Act.

It is less arguable that they violate the *spirit* of that legislation.

In this connection it is clear to the Court that the rank and file membership is not afforded full opportunity to participate in the affairs of its International Union.

[COURT'S DECISION]

For the reasons foregoing, the Court:

1. Denies the plaintiffs' request for a preliminary injunction against the holding of the Convention.

2. Orders the Convention to take such action with regard to procedures for amending the Constitution as would permit a predetermined number of responsible members to petition for changes in the Constitution. Receipt of such petition should set in motion a process for notification of the entire membership and a referendum had thereon concerning its adoption or rejection.

Action on such petition should be prompt and not be postponed until the next Convention, which may not take place for several years.

The court so orders without attorneys' fees or costs.

MR. BRIDGES: Your Honor, the plaintiffs respectfully request permission for an appeal.

THE COURT: Very well.

MR. BRIDGES: Thank you very much.

MR. BERGAN: If Your Honor please, before counsel has left—

THE COURT: Yes.

MR. BERGAN: With respect to the portion of your order directing certain procedures with respect to constitutional amendments, we have not yet decided whether to take this matter to the Court of Appeals, but in the event we do, I think it is required that we ask this Court to stay the effectiveness of that order pending appeal.

THE COURT: The Court will not stay that order.

MR. BERGAN: Finally, Ma'am, the complaint was served, if my recollection serves me correctly, on the 21st of June.

May we have an additional fifteen days to respond to the allegations of the complaint, both defendants?

THE COURT: Well, I suppose that it is moot insofar as the injunction over having the Convention is concerned.

MR. BERGAN: I suspect that it is, and actually, with respect to the Court's ruling on the Constitutional amendments, there is no such allegation in the complaint.

THE COURT: Oh, yes, there is.

MR. BERGAN: There is?

THE COURT: Yes, indeed.

MR. BERGAN: Sorry.

Well, may we have an additional fifteen days to respond to the complaint?

THE COURT: Certainly.

U. S. DISTRICT COURT
DISTRICT OF COLUMBIA

Nos. 71-1520 and 71-1634

VESTAL, *et al.*

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *et al.*

VESTAL, *et al.*

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, *et al.*

November 1, 1972

LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT

—Procedure for amending of union constitution § 5.15

Federal district court erred in ordering international union to adopt petition and referendum procedure for amending international constitution between conventions, there being no basis in Title IV of LMRDA or elsewhere for such order.

Appeals from the U.S. District Court for the District of Columbia (77 LRRM 2997). Appeal in No. 71-1520 dismissed as moot, and judgment appealed from in No. 71-1634 reversed.

See also 77 LRRM 2998.

Stanley Sidicane, Nashville, Tenn., for appellants in No. 71-1520 and appellees in No. 71-1634.

David Previant (Goldberg, Previant & Uelmen), Milwaukee, Wis., and Raymond W. Bergan (Williams, Connolly & Califano), Washington, D.C., for appellants in No. 71-1634 and appellees in No. 71-1520.

Before DANAHER, Senior Circuit Judge, and McGOWAN and ROBB, Circuit Judges.

Full Text of Judgment

PER CURIAM:—These causes came on for consideration on the records on appeal from the United States District Court for the District of Columbia and briefs were filed herein by the parties. On consideration of the foregoing, it is

ORDERED and ADJUDGED by the Court that the appeal in No. 71-1520 is hereby dismissed as moot and the judgment of the District Court appealed from in No. 71-1634 is hereby reversed for the reasons set forth in the attached memorandum.

Full Text of Opinion

PER CURIAM:—In No. 71-1520, the relief sought was essentially to enjoin the holding in 1971 of the quinquennial convention of the International Brotherhood of Teamsters. A preliminary injunction to this effect was denied by the District Court, and summary reversal was denied by this court. The convention was in fact held, and the

issues raised by this appeal no longer are of practical significance, rendering the appeal, in our judgment, moot.

In No. 71-1634, we are of the opinion that the injunctive order of the District Court appealed from should be reversed. In that order the District Court directed the Union to adopt a petition and referendum procedure for amending the union constitution between conventions. This order, which issued only thirteen days before the 1971 convention was to be held, was complied with by appellants at that convention, but only in deference to the District Court's order and upon the representations of counsel to the convention members that the matter would be appealed. We find no basis in the Labor Management Reporting and Disclosure Act, 29 U.S.C. §§ 401 et seq., or elsewhere, for the District Court's action.

Supreme Court, U. S.
FILED
JUL 23 1980
MICHAEL RODAK, JR., CLERK

No. 79-1848

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

RETAIL STORE EMPLOYEES UNION, LOCAL NO. 919; ARNALDO F. ESPINOSA, *et al.*,
Petitioners,

v.

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION; WILLIAM H. WYNN, *et al.*,
Respondents.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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TABLE OF AUTHORITIES

CASES: Page

Berenyi v. *Immigration Director*, 385 U.S. 630 (1967) 1
Gomillion v. *Lightfoot*, 364 U.S. 339 (1966) 4
Local No. 1 (ACA), Etc. v. *I.B.T., C., W. & H.*, 419 F.Supp. 263 (E.D. Pa., 1976), *aff'd on other issues*, 614 F.2d 846 (3 Cir. 1980) 3
Mills v. *Electric Auto-Lite*, 396 U.S. 375 (1970) .. 1
Musicians Federation v. *Wittstein*, 379 U.S. 171 (1964) 2
Scofield v. *NLRB*, 394 U.S. 423 (1969) 3
United States v. *Powell*, 379 U.S. 48 (1964) 2

MISCELLANEOUS:

Berry, *Tax Audit for Civil Rights: The IRS Bullies the New South*, The Nation, March 6, 1978, at 249 3
Stern & Gressman, *Supreme Court Practice* (5th ed., 1978) 2

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1. Respondents' attack upon and misrepresentation of the findings of the District Court, approved below (Cf. Opp. 4, 5, 7, 8, 12, 15, 16 with Pet. 5-10), (*e.g.*, "there is no evidence of there being a discriminatory, illegally motivated audit in this case" (Opp. 16); "no evidence of subjective intent to discriminate" (Opp. 13), both *contra* findings (Pet. 5-10); "the District Court [assertedly] *could have* justifiably *concluded* * * * [but did not (Pet. 6-7)] that an audit would have been conducted regardless of the existence of hostility" (Opp. 8, emphasis added)), are barred by the "two-court" rule. *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635, 636 (1967); *Mills* v. *Electric Auto-Lite*, 396 U.S. 375, 381 n. 4

(1970); Stern & Gressman, *Supreme Court Practice*, 290-291 (5th ed., 1978).[1]

2. This assault aside, the Opposition confirms that the underlying issue is whether the possibility that a discriminatory, illegally motivated, audit may turn up evidence of wrongdoing exempts such audits from the Congressional prohibition and policy (Pet. 17-18), against discriminatory, illegally motivated, parent body interference with local autonomy.[2] Respondents' argument that

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[1] Respondents' assertion (Opp. 5), that "Petitioners seriously misrepresented the significance of the [interim] report" (at Pet. 11, n. 9), is wholly unwarranted. The report does not even refer to the rumored "diver[sion of] union assets to pay personal entertainment expenses for [Espinosa] and female companions" (Opp. 2, 5) or to the allegedly "unusually high expenditures for printing, promotional items, and liquor" (*id.*, 2). The assumption of the interim report, reflected in the Opposition 2-3, 5, 6-7, 8, 12-13, 14, that Espinosa's routine union business expenditures were wrongfully "undocumented" or "inadequately documented" and that this plus the relative handful of so called "double billings" is "evidence of financial irregularities" (Opp. 14) flouts the contrary findings of the courts below (Pet. 8, 14a-17a).

[2] Respondents' attempt to emasculate *Parks* (Opp. 12), which they erroneously attribute to the Second Circuit, by burying its significance beneath irrelevancies (*id.*, 11-12), is as disingenuous as their invocation of *Vestal* v. *Teamsters* (*id.*, 11) for the proposition that "the 'spirit' of the LMRDA may [not] be invoked to invalidate union constitution provisions." The Court of Appeals reversed in *Vestal* because it found no support for the district court's assumption that failure to provide for submission of amendments to rank and file members violated "the spirit of" the Act (LMRDA "authorizes a representative system of government and does not require a town meeting for action by an international or national union" (*Musicians Federation* v. *Wittstein*, 379 U.S. 171, 182 (1964)), not because a constitutional provision which violates "the spirit of the LMRDA but not necessarily its language" (Opp. 11), is immune.

proof of discrimination and illegal motivation should not constitute a defense because to allow it would *pro tanto* de-"maximize the potential exposure of corruption or financial malpractice" (Opp. 10, 14), confirms petitioners' perception of the rationale behind the holdings below (Pet. 19).

If searches for financial wrongdoing are "entirely harmless", as respondents would have it (Opp. 10), why do authorities use them against their enemies?[3] If the law prohibits even public officials from conducting audits and other financial investigations in bad faith (Pet. 19-20), despite the adverse impact of that prohibition on potential exposure of wrongdoing, how can it sanction bad faith audits by parent body union officials? That Congress authorized good faith audits (Opp. 13-14) cannot, even by the remotest stretch of imagination, imply that it authorized bad faith ones.[4] *Local No. 1 (ACA), Etc.* v. *I.B.T., C., W. & H.*, 419 F. Supp. 263, 272-73 (E.D. Pa., 1976), affd. on other issues, 614 F.2d 846 (3 Cir., 1980), applying the teachings of *Scofield* v. *NLRB*, 394

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[3] See, *e.g.*, Berry, *Tax Audit for Civil Rights: The IRS Bullies the New South*, The Nation, March 6, 1976, p. 269.

[4] Precisely in point is this Court's holding in *United States* v. *Powell*, 379 U.S. 48, 58 (1964):

> "Nor does our reading of the statutes mean that under no circumstances may the court inquire into the underlying reasons for the examination. It is the court's process which is invoked to enforce the administrative summons and a court may not permit its process to be abused [footnote omitted]. *Such an abuse would take place if the summons had been issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation.*" (Emphasis added.)

U.S. 423, 429-430 (1969) and *Gomillion* v. *Lightfoot*, 364 U.S. 339, 347 (1966), to LMRDA. Respondents' failure to address this crucial question (Opp. 13), like that of the courts below, emphasizes the necessity of its resolution by this Court.

Respectfully submitted,

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